

No. 89-700-CFX  
Status: GRANTED

Title: Astroline Communications Company Limited  
Partnership, Petitioner  
v.  
Shurberg Broadcasting of Hartford, Inc., et al.

Docketed:  
October 30, 1989

Court: United States Court of Appeals for  
the District of Columbia Circuit

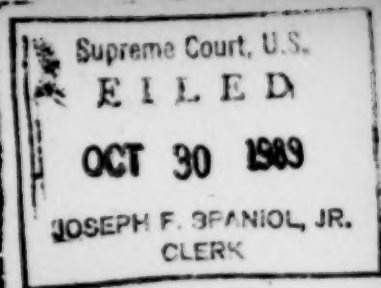
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Counsel for respondent: Cole, Harry F., Pettit, Robert L.

Entry	Date	Note	Proceedings and Orders
1	Sep 11 1989	G	Application (A89-207) to extend the time to file a petition for a writ of certiorari from September 14, 1989 to October 30, 1989, submitted to The Chief Justice.
2	Sep 13 1989		Application (A89-207) granted by the Chief Justice extending the time to file until October 29, 1989.
3	Oct 30 1989	G	Petition for writ of certiorari filed.
5	Nov 17 1989		Order extending time to file brief of respondent on the merits until December 5, 1989.
6	Nov 17 1989		The above extension is for all respondents.
7	Dec 5 1989		Brief of respondent Shurberg Broadcasting in opposition filed.
9	Dec 5 1989		Brief of respondent FCC in opposition filed.
10	Dec 5 1989	G	Motion of Congressional Black Caucus, et al. for leave to file a brief as amici curiae filed.
8	Dec 6 1989		DISTRIBUTED. January 5, 1990
11	Jan 2 1990	N	Motion of respondent Shurberg Broadcasting of Hartford Inc. to withdraw brief in opposition filed.
13	Jan 8 1990		Motion of Congressional Black Caucus, et al. for leave to file a brief as amici curiae GRANTED.
14	Jan 8 1990		Petition GRANTED. and the parties are directed to adhere to the following briefing schedule. The brief of the petitioner must be received by the Clerk on or before February 9, 1990. The brief of the respondent must be received by the Clerk on or before March 6, 1990, and a reply brief, if any, must be received by the Clerk on or before March 16, 1990.
15	Jan 26 1990		***** SET FOR ARGUMENT WEDNESDAY, MARCH 28, 1990. (2ND CASE)
19	Feb 8 1990		Brief amicus curiae of National Bar Association filed.
16	Feb 9 1990		Brief of respondent FCC supporting petitioner filed.
17	Feb 9 1990		Joint appendix filed.
18	Feb 9 1990		Brief of petitioner Astroline Communications Co. filed.
21	Feb 9 1990		Brief amici curiae of Congressional Black Caucus, et al. filed.
22	Feb 9 1990	G	Motion of Committee to Promote Diversity for leave to file a brief as amicus curiae filed.
23	Feb 9 1990		Brief amicus curiae of National Assn. of Black Owned Broadcasters, Inc. filed.
24	Feb 9 1990		Brief amici curiae of ACLU, et al. filed. VIDED.
20	Feb 12 1990		Record filed.
		*	Certified copy of original record, 6 volumes and 1

Entry	Date	Note	Proceedings and Orders
			folder, received. (Box).
25	Feb 20 1990	Opposition of Shurberg Broadcasting to motion of Committee to Promote Diversity for leave to file a brief as amicus curiae filed.	
27	Mar 2 1990	CIRCULATED.	
26	Mar 5 1990	Motion of Committee to Promote Diversity for leave to file a brief as amicus curiae GRANTED.	
30	Mar 5 1990	X Brief amicus curiae of Pacific Legal Foundation filed.	
31	Mar 5 1990	X Brief amicus curiae of Southeastern Legal Foundation, Inc. filed.	
28	Mar 6 1990	X Brief of respondent Shurberg Broadcasting filed.	
29	Mar 6 1990	X Brief amicus curiae of United States filed.	
32	Mar 6 1990	Lodging received. (15 copies) (Box).	
33	Mar 16 1990	X Reply brief of petitioner Astroline Communications Co. filed.	
34	Mar 28 1990	ARGUED.	

89-700<sup>(1)</sup>



No. 89-

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

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**QUESTIONS PRESENTED**

1. Whether an affirmative action program implemented by the Federal Communications Commission to enhance diversity in programming by increasing minority ownership of broadcast stations is unconstitutional because it is assertedly not "narrowly tailored" to serve a concededly compelling governmental purpose.

2. Whether a reviewing court may disregard Congress' express approval and adoption of such a program.

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OCTOBER TERM, 1989

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ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

Astroline Communications Company Limited Partnership ("Astroline") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.<sup>1</sup>

## OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 876 F.2d 902, and

<sup>1</sup> Rule 28.1 statement. Petitioner Astroline is a limited partnership comprising two general partners, Richard P. Ramirez and WHCT Management, Inc., and one limited partner, Astroline Company.

is reprinted in the appendix hereto, 1a. The opinions of the Federal Communications Commission are reported at 68 F.C.C.2d 979 and 99 F.C.C.2d 1164, and are reprinted in the appendix hereto, 113a and 130a, respectively.

### JURISDICTION

The judgment of the court of appeals (141a) was entered on March 31, 1989. A timely petition for rehearing, and suggestion for rehearing *en banc*, were denied on June 16, 1989 (143a, 155a). On September 13, 1989, the Chief Justice ordered that the time within which to file a petition for a writ of certiorari be extended to and including Sunday, October 29, 1989. Pursuant to Sup. Ct. R. 29.1, October 30, 1989 is the next day which is not a Sunday or a federal legal holiday. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fifth Amendments to the Constitution, the Communications Amendments Act of 1982, 47 U.S.C. §§ 309(i)(3)(A) and (C)(ii), the Joint Resolution, Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987), and the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186 (1988), are set out at 161a, *et seq.*

### STATEMENT

More than a decade ago, the Federal Communications Commission found that the broadcast media

failed to reflect the views of minorities because minorities were acutely underrepresented among owners of broadcast stations. Fewer than one per cent of U.S. broadcast stations were owned by minorities, even though minorities comprised about 20 per cent of the population. The FCC had adopted and vigorously enforced equal employment opportunity requirements for broadcast licensees, and had required licensees to consult with leaders of the minority community to ascertain community interests and develop programming responsive to those interests. 130-132a. Despite its efforts, the FCC said that it was "compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media." 133a (footnotes omitted). The FCC found that situation to be "detrimental not only to the minority audience but to all of the viewing and listening public," and inconsistent with its obligations, under the Communications Act of 1934 and the First Amendment, to promote diversity of broadcast programming. 133a.<sup>2</sup>

The FCC took several steps to remedy the underrepresentation of minorities as owners of broadcast stations. One of those steps was the adoption of the distress sale program at issue here. That program

<sup>2</sup> In a series of decisions both preceding and following adoption of the distress sale policy, the Court of Appeals for the District of Columbia Circuit has pressed the FCC to pursue its responsibility to enhance programming diversity by giving favorable consideration to minority applicants for broadcast licenses. *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975); *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

permitted licensees whose licenses had been designated for revocation hearing, or whose renewal applications had been designated for hearing on basic qualification issues, to transfer or assign their licenses at a discounted "distress sale" price to applicants with a significant minority ownership interest. 138a.<sup>3</sup> The program thus gave licensees at risk for license revocation the chance to salvage some of their investment by opting for a distress sale, while serving the public interest by increasing the number of minority owners of broadcast stations.<sup>4</sup> No licensee was required to enter into a distress sale, nor did the FCC earmark any specified number or percentage of licenses for distress sale treatment.

In November 1980, the FCC designated the renewal application of Faith Center, Inc. to operate WHCT-TV (Channel 18 in Hartford, Connecticut) for hearing to determine whether Faith Center was qualified to remain a licensee. 115-116a. Faith Center twice applied for, and received, the FCC's authorization to effect a distress sale of the license to minority buyers, but neither sale was consummated. 116a.

In December 1983, Shurberg Broadcasting of Hartford, Inc. and its principal, Alan Shurberg (collectively

<sup>3</sup> Originally, purchasers could qualify for the distress sale program if a minority owned more than a 50 per cent, or controlling, interest in the purchasing entity. 138a. In 1982, the FCC extended eligibility for the program to limited partnerships in which the general partner was a member of a minority group, and owned at least 20 per cent of the broadcasting entity. *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

<sup>4</sup> Ordinarily, the FCC does not permit a licensee whose basic qualifications are in question to sell or assign the license. 4a.

"Shurberg") filed a competing application for Channel 18 in Hartford, and in April 1984, Shurberg petitioned the FCC to designate its application for a comparative hearing with Faith Center's renewal application, arguing (among other points) that the distress sale program was unconstitutional. 117a, 122a. In June 1984, Faith Center requested the FCC's authorization for a third time to accomplish a distress sale, this time to Astroline, a minority-controlled limited partnership whose principal general partner was Richard P. Ramirez. 116-117a, 125a.

In December 1984, the FCC denied Shurberg's petition, rejecting its constitutional arguments as "without merit." 122a. Relying on its 1978 policy statement creating the distress sale program, the FCC reiterated its finding of "an acute underrepresentation of minorities among the owners of broadcast stations and that views of racial minorities were inadequately represented in the broadcast media." 122a. The FCC also noted "that increasing minority ownership of broadcast stations would result in diversity of control of a limited resource, the broadcast spectrum, and would result in a more diverse selection of programming for the entire viewing and listening public." 122-123a.

The FCC also took note of Congress' passage of the Communications Amendments Act of 1982, and in particular Congress' express requirement that significant preferences for minority applicants be incorporated into any lottery plan that the FCC might adopt as a replacement for the comparative evaluation process. 123-124a. The FCC noted that Congress had

relied in part upon the 1978 policy statement establishing the distress sale program as evidence of the need for minority preferences in any lottery system. 124a. The FCC said: "Thus Congress, which has the broadest remedial power of any governmental entity, has recognized the need for and approved the implementation of the minority ownership policies set forth in the 1978 policy statement." 124a (footnote omitted). The FCC also relied upon *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), in which the court of appeals upheld the FCC's use of minority preferences in the comparative hearing process, and interpreted Congress' 1982 legislation as Congressional approval of the Commission's minority ownership promotion policies. 123-124a.

Shurberg petitioned the court of appeals for review, and four years elapsed between filing of the petition for review and the court's decision. In the meantime, Congress acted twice more to express in legislation its approval of the distress sale program and the FCC's other minority preference programs. In its Joint Resolution, Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987) (162a), Congress forbade the FCC to repeal or alter the distress sale program, referring expressly to its past support for the FCC's minority preference programs and its recognition of the important policy goals served by diversification of ownership of broadcast properties. S. Rep. 182, 100th Cong., 1st Sess. 76 (1987). The following year, Congress extended through fiscal 1989 its prohibition on abandoning or altering the distress sale program and the FCC's other minority preference policies. The Departments of Com-

merce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186 (163a).

In March 1989, a divided court of appeals found the distress sale program unconstitutional. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989). Judges Silberman and MacKinnon, who constituted the majority, agreed only on a one-paragraph *per curiam* opinion which said, in pertinent part, that

the FCC's minority distress sale program unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote programming diversity. Specifically, the program unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interests it seeks to vindicate.

2a. Judge Silberman and Judge MacKinnon each wrote lengthy separate opinions; Chief Judge Wald dissented.

Judge Silberman first rejected the distress sale program as a remedy for prior discrimination. He wrote that neither Congress nor the FCC had linked minority underrepresentation in the broadcast industry to discrimination by the FCC itself, or to particularized discrimination in the broadcast industry. 27a. He rejected societal discrimination as an adequate basis for the program, doubting "that Congress may act without *some* quantum of particularized evidence of

the effects of societal discrimination in the relevant industry." 28a (emphasis in original). Even if societal discrimination could support a remedial program, he found the distress sale program to lack "narrow tailoring" because (1) it was not tied to the effects of past discrimination; (2) the FCC had not considered race-neutral alternatives; and (3) the program imposed an undue burden on Shurberg, which he analogized to being "disqualified from the *only* job currently available in a given community solely because of . . . race." 36a (emphasis in original).

Turning to the diversity-enhancing basis for the program, Judge Silberman accepted with considerable reluctance that the promotion of programming diversity is a sufficiently compelling governmental purpose to support a race-conscious policy. 39a. But he rejected the nexus found by both the FCC and Congress between diversity of station ownership and diversity of programming. In particular, he faulted Congress for its failure to make "historical findings of fact" (45a), for its omission to present or cite "evidence . . . of a nexus between program diversity and minority ownership" (46a), and for the absence "of any material developed in congressional hearings." 47a.

Judge MacKinnon concurred in the judgment with Judge Silberman, but he disagreed pointedly with Judge Silberman's reasoning in important respects. In particular, Judge MacKinnon would not join in Judge Silberman's rejection of the Congressional determination that a nexus exists between diversity of station ownership and diversity of programming. "Congress is not required to write legal opinions to justify its legislation," Judge MacKinnon said, finding

it "difficult to dispute the assertion that Congress found there was a nexus between minority ownership and programming diversity." 64a, 66a.

Judge MacKinnon concluded, however, that the program was not narrowly tailored to achieve its goals because "there is no actual limitation, in theory or in practice, on the number of licenses that may be so transferred," and because "[c]ompliance is voluntary and the program contains no assurance that any programming diversity will be achieved." 63a (footnote omitted). Recognizing that only 38 licenses had been transferred during the first ten years of the program's operation, Judge MacKinnon faulted the program because it might result in the transfer of valuable broadcast properties in cities such as New York, Boston, and Los Angeles. 61a. Judge MacKinnon also found that the program imposes an undue burden on nonminorities because it forecloses non-minority purchasers from obtaining a license in the community where they desire to do so, and "will necessarily exclude *every* nonminority individual in *every* distress sale." 68a (emphasis in original).

Chief Judge Wald dissented, describing the distress sale program as "a unique type of governmental access program not heretofore passed on by the Supreme Court." 70a. She wrote that

[i]n casting off a thoughtfully conceived and monitored program aimed at attaining a legitimate congressionally mandated end, the majority has too rigidly applied Supreme Court affirmative action guidelines designed for other types of programs, ignored firm precedents in this circuit, and failed to credit the explicit intent of Congress.

70a.

Chief Judge Wald disagreed with Judge Silberman's conclusion that Congressional findings of a nexus between ownership and programming could be judicially disregarded. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), she wrote, this Court "quite clearly rejected the notion that courts may inquire into the sufficiency of congressional deliberations." 82a. Rather, she concluded, "deliberativeness must be presumed so long as Congress had before it sufficient information for the formation of a considered opinion." 82a (footnote omitted).

Chief Judge Wald concluded that diversity of programming expression is a compelling governmental purpose, that Congress and the FCC had found a nexus between that purpose and diversity of ownership, and that the method chosen by the FCC and endorsed by Congress "clearly meets the test of 'narrow tailoring.'" 97a. In particular, she found no undue burden on nonminorities: "[T]he near-monopoly exercised by nonminorities over broadcast media—they control approximately 98% of all broadcast licenses—and the very limited circumstances in which the distress sale policy can be invoked, suggest that the burden the policy places on nonminority applicants is acceptable." 109a (footnote omitted).

Both the FCC and Astroline filed timely petitions for rehearing, and suggestions for rehearing *en banc*. The petitions were denied on June 16, 1989. The suggestions for rehearing *en banc* failed by a 5-5 tie vote among the judges in regular active service on the court. Chief Judge Wald dissented from the denial of rehearing *en banc*, joined by Judges Robinson, Mikva, Edwards, and Ruth B. Ginsburg. The five dissenting

judges joined in Chief Judge Wald's statement in which she stressed that "the continued use of the distress sale policy has been mandated by an Act of Congress." 157a. She wrote that "substantial uncertainty" had been created regarding the permissible scope of race as a consideration in FCC licensing decisions. 159a. Finally, she wrote that the panel decision created "substantial doubt" about whether the advancement of diversity could justify *any* affirmative action programs, "clearly [calling] into question the constitutionality of affirmative action programs in student admissions at public universities." 159a (footnote omitted).

Three weeks after the court of appeals' decision in this case, a different panel of the court, also divided 2-1, upheld as constitutional the FCC's use of minority preferences in the context of comparative hearings. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *petition for cert. filed sub nom. Metro Broadcasting, Inc. v. FCC*, 58 U.S.L.W. 3242 (U.S. Sept. 18, 1989) (No. 89-453). The *Winter Park* majority relied in part on Congressional approval of the FCC's minority preference policies, and regarded the legality of the preference as "easily resolved" in light of the court of appeals' prior decision in *West Michigan* and Congress' endorsement of the preference. 873 F.2d at 353, 355.

#### REASONS FOR GRANTING THE PETITION

This Court has upheld race-conscious affirmative action programs if those programs are "narrowly tailored" to the achievement of a compelling governmental purpose. *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980). But in this case, the court of appeals

has elevated the requirement of narrow tailoring to a level that few, if any, affirmative action programs could meet. The unreasonableness of that heightened standard prompted Chief Judge Wald—joined by four other members of the court of appeals—to write that the court's opinions have “constitutional ramifications stretching well beyond the broadcasting context” because they create “considerable doubt as to whether the pursuit of diversity remains a viable justification for affirmative action programs in *any* setting.” 159a (emphasis in original). Strict scrutiny of race-conscious preference programs should not mean, as it did here, scrutiny that is “strict in theory, but fatal in fact.” *Fullilove*, 448 U.S. at 507 (Powell, J.).

The court of appeals' excessive demand for narrow tailoring is especially misplaced because it invalidated a program that Congress has expressly approved, and directed the FCC to maintain. Congress three times declared its full support for the distress sale program, and on two of those occasions forbade the FCC to discontinue it. The court of appeals gave little weight to Congressional approval of the program's ends and means, or to this Court's deference when “pass[ing], not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President.” *Fullilove*, 448 U.S. at 473. See also *Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 718-19 (1989).

The two-judge majority of the court of appeals conceded, albeit grudgingly, the compelling governmental purpose in advancing diversity of viewpoint in broadcasting. There is in fact no doubt that such a compelling purpose exists, or that the FCC is bound to serve it. “[T]he ‘public interest’ standard necessarily

invites reference to First Amendment principles, . . . and, in particular, to the First Amendment goal of achieving ‘the widest possible dissemination of information from diverse and antagonistic sources.’ ” *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978), quoting *Columbia Broadcasting System v. Democratic National Comm.*, 412 U.S. 94, 122 (1973) and *Associated Press v. United States*, 326 U.S. 1, 20 (1945). See also *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 670 n.7 (1976) (FCC bears “obligation” under the Communications Act of 1934 “to ensure that its licensees’ programming fairly reflects the tastes and viewpoints of minority groups.”). The court of appeals nevertheless declared the distress sale program unconstitutional because the court deemed it not narrowly tailored to achieve its concededly compelling purpose.

A narrowly tailored program need not “be limited to the least restrictive means of implementation.” *Fullilove*, 448 U.S. at 508 (Powell, J.); accord *United States v. Paradise*, 480 U.S. 149, 184 (1987). Nor is it a “constitutional defect” that a program “may disappoint the expectations of nonminority firms.” *Fullilove*, 448 U.S. at 484. “As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.” *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280-81 (1986). But the burden borne by the disappointed applicant here was so light that the court of appeals’ decision throws into doubt whether an affirmative action program can constitutionally entail *any* substantial cost to a nonminority firm. As Chief Judge Wald wrote, the court of appeals’ opinions suggest “that affirmative action

is permissible only when nothing very important is at stake, when such a superabundance of opportunity exists that no one need go without." 109a.

1. "*Relatively light*" burden on nonminorities. A race-conscious program is narrowly tailored when "the actual 'burden' shouldered by nonminority firms is relatively light." *Fullilove*, 448 U.S. at 484. During the first ten years of its operation, the distress sale program resulted in the transfer of 38 broadcast licenses to minority firms. 55a. The FCC estimates that it approved a total of approximately 9,000 broadcast license sales during that period. Petition for Rehearing and Suggestion for Rehearing *En Banc* of Federal Communications Commission at 11-12. The distress sale policy thus affected about four-tenths of one per cent of license sales over the course of a decade. By comparison, the set-aside program upheld in *Fullilove* foreclosed nonminority firms from ten per cent of federal public works grants (or about .25 per cent of the annual construction expenditures in the United States). 448 U.S. at 484 n.72.

The court of appeals avoided the obvious parallels with *Fullilove* by defining the opportunity to compete for a single station in a single locality as unique. 35a. Judge Silberman adopted this exceedingly narrow focus because "[i]t is a Hartford station Shurberg wants . . .". 35a (emphasis added). But this Court has never measured the burden on a nonminority by the intensity of his desires for a particular position in a particular place. If that were the rule, the loss of any economic opportunity would be an unconstitutional burden if the nonminority could show that he wanted it badly enough. In *Fullilove*, the Court measured the

extent of foreclosure on a national scale; here, the court of appeals limited itself to a universe of one.

The burden on the nonminority would be heavier, of course, if that person lost an existing livelihood. But nothing of the sort happened here: at most, all Shurberg lost was one chance to enter a new field at a single place and time, and not an existing job. This Court has drawn a sharp distinction between layoffs and "valid hiring goals," by which "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282 (emphasis in original). As Chief Judge Wald pointed out, a nonminority applicant who wishes to seek a broadcast license through the vagaries of a comparative hearing "certainly lacks the legitimate expectation of continued employment of someone already working." 107a.

2. No "inflexible percentage" based on race. Another hallmark of a narrowly tailored (and therefore constitutional) affirmative action program is that benefits are not allocated "according to inflexible percentages solely based on race or ethnicity." *Fullilove*, 448 U.S. at 473 (emphasis added). See also *Regents of University of California v. Bakke*, 438 U.S. 265, 319 (1978) (nonminority applicants "are totally excluded from a specific percentage of the seats in an entering class") (emphasis added); *Croson*, 109 S. Ct. at 722 (program "completely eliminated nonminorities from consideration for a specified percentage of opportunities") (emphasis added). The distress sale program does not allocate a fixed number or percentage of broadcast licenses to minorities, nor are nonminorities eliminated from consideration for licenses whose holders opt for a distress sale.

The FCC did not reserve for minority owners the 38 licenses transferred under the distress sale program over the first ten years of that program's operation. Rather, those licenses were the unpredictable result of voluntary decisions by licensees whose licenses were designated for a revocation hearing, or for a renewal hearing on basic qualification issues. Only those licensees who opted for a distress sale, and who found a willing buyer, actually transferred their licenses through the program. The distress sale program did not affect any licensee who decided to contest the hearing, or who did not find a buyer. The FCC did not (and could not) compel a licensee to transfer its license to a minority purchaser. As Chief Judge Wald wrote, "Because of the unique and unpredictable nature of such situations, a distress sale can hardly be said to disrupt the settled expectations of potential licensees." 107a.

Nor are nonminority aspirants excluded from competition for the license at issue. In establishing the program, the FCC required that each distress sale application receive its approval. 62a.<sup>5</sup> Nonminority competitors can oppose both the licensee's election of a distress sale, and the specific transaction submitted to the FCC. That is exactly what Shurberg did here, challenging both the distress sale petition and Astroline's *bona fides* as a minority-controlled entity. 125a. Indeed, the FCC accepted Shurberg's arguments to

<sup>5</sup> In 1982, the FCC delegated to the Mass Media Bureau the authority to process, still on a case-by-case basis, distress sale petitions that were consistent with established FCC policy and did not involve novel questions of fact, law, or policy. *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 859 (1982).

the extent of declaring that no further distress sale applications would be entertained for WHCT-TV, and that if the Astroline sale fell through, the license would be opened to a comparative proceeding in which Shurberg and any other interested party could participate.<sup>6</sup>

3. *Consideration of race-neutral alternatives.* Yet another mark of a narrowly tailored and constitutional affirmative action program is whether race-neutral means of achieving a compelling governmental purpose have been considered. *Croson*, 109 S. Ct. at 728; *Wygant*, 476 U.S. at 280 n.6. The FCC expressly weighed race-neutral solutions and for good reasons did not adopt them, a fact that the court of appeals disregarded.

The compelling governmental purpose served by the distress sale program is diversity of expression. The FCC considered, and properly rejected as foreclosed by the First Amendment, the race-neutral alternative of promoting diversity of expression through direct

<sup>6</sup> Shurberg, of course, had no assurance of prevailing if the license were subjected to a comparative hearing. Faith Center might have retained the license, Astroline might have won it, or a hitherto unknown third party could have obtained it. Compare *Bakke*, 438 U.S. at 320, in which the petitioner's admission to the medical school was ordered because no non-racial ground existed for excluding him. Here, it is purest speculation to suppose that Shurberg would have gained the license in a comparative hearing. See also *Paradise*, 480 U.S. at 189 (Powell, J., concurring) ("uncertain" whether and when nonminority state troopers would have been promoted absent a race-conscious remedy).

regulation of broadcast content. 134a. "[D]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'" *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 796-97 (1978). See also *FCC v. League of Women Voters*, 468 U.S. 364 (1984)(legitimate governmental interest in assuring freedom of public broadcasting stations from governmental control cannot be pursued by content regulation).

Before embracing the distress sale policy, the FCC adopted equal employment opportunity rules in 1969, followed in 1976 by ascertainment requirements that licensees contact community leaders (expressly including minorities) to determine whether community needs were being met. 130-132a. Despite these efforts, the FCC was "compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media." 133a (footnotes omitted). Chief Judge Wald noted that these efforts "clearly meet[] the test of 'narrow tailoring'" because "the distress sale policy satisfies the *Croson* Court's requirement that racial preferences be employed only after race-neutral methods have been found wanting." 97-99a.<sup>7</sup>

<sup>7</sup> Judge Silberman's opinion concedes these efforts, but faults the FCC for failing to adopt unspecified measures to publicize stations up for sale or to facilitate financing. 32a. Judge Silberman does not explain how these measures could be expected, in any reasonable time frame, to increase minority ownership. The array of possible race-neutral alternatives that a reviewing court may later suggest is limited only by the court's imagination. A court owes deference, however, to the FCC's selection

4. *Case-by-case administrative scrutiny.* A narrowly tailored affirmative action program should incorporate an administrative mechanism that offers "reasonable assurance" that its purposes will be accomplished and "that misapplications of the program will be promptly and adequately remedied administratively." *Fullilove*, 448 U.S. at 487. Such a mechanism indisputably exists here: every distress sale application requires the FCC's individualized approval. Objectors such as Shurberg can be heard on whatever issues they wish to raise. "Administrative procedures will be adequate if the decision-making body has the opportunity to consider the appropriateness of awarding each contract on the basis of race-conscious preferences." *Associated Gen. Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 937 n.30 (9th Cir. 1987).

For example, the FCC is alert to ferret out distress sale purchasers who are merely minority "fronts." *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 855 (1982); see *Fullilove*, 448 U.S. at 487-88 ("There is administrative scrutiny to identify and eliminate from participation in the program MBE's who are not 'bona fide' . . . spurious minority-front entities can be exposed."). Shurberg raised just such an objection before the FCC. Shurberg also could and did argue that the license should be denied distress sale treatment on the basis of competing public in-

of some race-neutral alternatives, and to its rejection of others whose efficacy is debatable, at best. "While a remedy must be narrowly tailored, that requirement does not operate to remove all discretion from the District Court in its construction of a remedial decree." *Paradise*, 480 U.S. at 185 (footnote omitted).

terest considerations, *e.g.*, the interest in license competition rather than the interest in minority ownership and diversity of expression.

The court of appeals ignored the FCC's individualized consideration of each distress sale application, though Judge Silberman faulted the FCC for not requiring the purchaser to demonstrate that it had suffered victimization or disadvantage from discrimination. 31a. This is beside the point, however, for the principal goal of the distress sale program is to promote diversity of expression through diversity of ownership, not to remedy prior discrimination. For that purpose, it is immaterial whether a minority owner has suffered personally from discrimination. As Chief Judge Wald wrote, "Any requirement that affirmative action plans bestow their benefits only on those who are themselves victims is therefore inapplicable to Congress' justification for the distress sale policy." 97a.

In short, the distress sale program is an affirmative action program narrowly tailored to accomplish its legitimate ends. Consistent with the decisions of this Court, the program imposes a relatively light burden on nonminorities, does not reserve a block of broadcast licenses solely for minorities, reflects unsuccessful prior experimentation with race-neutral alternatives, and incorporates a case-by-case administrative review through which aggrieved nonminority applicants can be heard.

These elements by themselves should sustain the distress sale program against constitutional attack even if the program were solely the invention of the FCC. But the program is more than that: with full knowledge, Congress has approved the distress sale

program and directed the FCC to preserve it intact. The distress sale program thus ceased to be merely the creature of the FCC, and was invested with the full measure of Congress' legislative authority. As Chief Judge Wald wrote, "[T]he distress sale program is today a deliberately chosen Congressional policy, embodied in legislation passed by the House and Senate and signed by the President." 79a.

When Congress passed the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, empowering the FCC to substitute a lottery for the comparative hearing process, it required the FCC to perpetuate strong preferences for minority applicants. The Conference Committee declared:

The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982). The Conference Committee cited explicitly to the FCC's promulgation of the distress sale policy as "[e]vidence of the need for such preferential treatment [that] has been amply demonstrated by the Commission, the Congress, and the courts." *Id.* at 44.

In 1987, after the FCC manifested the intention to reconsider (and perhaps abandon) its minority preference policies, Congress interceded and forbade the FCC to use its appropriated funds

to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, *distress sales* and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses

...

Pub. L. No. 100-202, 101 Stat. 1329 (1987) (emphasis added) (162a). The Senate Appropriations Committee Report said: "The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals." S. Rep. 182, 100th Cong., 1st Sess. 76 (1987). Congress reenacted a similar ban on disturbing the distress sale policy, and other minority preference programs, through fiscal 1989. Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988)(163a).

Congress thus manifested its awareness, approval, and adoption of the distress sale policy through positive legislation. This is far more than simple Congressional acquiescence in an administrative program. *Bob Jones University v. United States*, 461 U.S. 574, 599-603 (1983). Rather, "[a]ny doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 615 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985) (emphasis added). See also *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 355 (D.C. Cir. 1989), petition for cert. filed sub nom. *Metro Broadcasting, Inc. v. FCC*, 58 U.S.L.W. 3242 (U.S. Sept. 18, 1989)

(No. 89-453) ("Like the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' express approval. Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership in the award of broadcast licenses.")<sup>8</sup>

The court of appeals conceded the compelling governmental interest in diversity of broadcast expression that Congress and the FCC sought to serve through the distress sale policy. But the court rendered no deference to the means that they selected to advance that interest. " '[I]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power.' " *Fullilove*, 448 U.S. at 480, quoting *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949) (opinion of Jackson, J.). This Court has often stressed the breadth of Congress' remedial power, and contrasted it with the more circumscribed power possessed by subordinate units of government.<sup>9</sup> Yet here, confronted with a program whose ends and means had been expressly adopted by Congress, the court of appeals accorded

<sup>8</sup> Both *West Michigan* and *Winter Park* dealt with the FCC's minority preference in comparative hearings rather than with the distress sale policy. The same legislation, however, expressed approval for both the comparative hearing preference and the distress sale policy, without distinction between them. Both policies are thus equally marked with Congress' imprimatur.

<sup>9</sup> "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove*, 448 U.S. at 483, quoted in *Croson*, 109 S. Ct. at 718.

that Congressional determination no more weight than one made by an "isolated segment[ ] of our vast governmental structures . . .". *Bakke*, 438 U.S. at 309.

The court of appeals' brief *per curiam* opinion also concluded that the distress sale program lacks narrow tailoring because it "is not reasonably related to the interests it seeks to vindicate." 2a. This unexplained reference appears to have had a different meaning for Judge Silberman than for Judge MacKinnon. Judge Silberman relied on the supposed absence of an adequate record compiled by Congress to support the nexus Congress found between diversity of station ownership and diversity of expression. Judge Silberman disregarded Congress' factual basis for approval of the distress sale program because Congress, in his view, failed to make "historical findings of fact," and lacked "support of any material developed in congressional hearings . . .". 45a, 47a. This is squarely contrary to *Fullilove*'s holding that "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." 448 U.S. at 478. "Such an intrusion into Congress' legislative deliberations would pose serious separation-of-powers problems, and neither the language nor logic of the Constitution compels such an inquiry." *National Treasury Employees Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984); see also dissent (Wald, C.J.), 83a ("Given this factual background, my colleague's refusal to regard the statute as a considered congressional choice is simply judicial presumptiveness.")

Moreover, *Fullilove* made clear that Congress need not act on the evidentiary record and findings that Judge Silberman would require. The *Fullilove* Court

quoted at length a House of Representatives report that relied on the "*presumption*" that "past discriminatory systems have resulted in present economic inequities," 448 U.S. at 465, referred to the "fundamental congressional *assumptions*" underlying the program (*id.* at 487), and upheld "the use of racial and ethnic criteria . . . premised on *assumptions* rebuttable in the administrative process." *Id.* at 489 (emphases added).<sup>10</sup>

Judge MacKinnon appeared to have a very different reason from Judge Silberman's for joining in the *per curiam* opinion's statement that the distress sale program is not reasonably related to its goals. He expressly disagreed with Judge Silberman's rejection of the Congressionally-determined nexus between diversity of ownership and diversity of programming. Rather, Judge MacKinnon was concerned because the distress sale program contained no limitation, by number or by value, on the stations that could be trans-

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<sup>10</sup> Congress' power to act on reasonable assumptions is not confined to remedying past discrimination, nor is Congress the only governmental body empowered to rely on such assumptions. Justice Powell's pivotal opinion in *Bakke* confirmed the ability of a university to take race into account in assembling a diverse student body. But Justice Powell required neither evidence nor findings to establish the nexus between racial diversity and educational quality. Rather, he wrote, educational excellence is "*widely believed to be promoted by a diverse student body[.]*" 438 U.S. at 312 (emphasis added), citing only an article by a university president who said that "[i]n the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs." *Id.* at 312 n.48. The contribution of diversity to education rested not on findings or evidence, Justice Powell said, but on "our tradition and experience." *Id.* at 313.

ferred. 61a, 63a. Given that an average of about four stations a year over ten years were transferred through distress sales, the lack of a maximum on the number of transfers hardly seems a realistic constitutional defect. The possibility that some of those stations might be valuable properties in major markets also does not rise to the level of a constitutional infirmity, unless affirmative action programs are constitutional only if the benefits gained by minority applicants are inconsequential. As Chief Judge Wald wrote, this approach suggests "that affirmative action is permissible only when nothing very important is at stake ...". 109a.

Judge MacKinnon also faulted the distress sale program "because compliance is voluntary and the program contains no assurance that any programming diversity will be achieved." 63a (footnote omitted). But the very same Congressionally-determined nexus between ownership and programming—the nexus that Judge MacKinnon said he was bound to accept—is what furnishes the "assurance" that the program will accomplish its goals. Moreover, a more direct intervention by the FCC into program content would entail " 'making qualitative judgments objectionable on both policy and First Amendment grounds.' " *National Citizens Comm. for Broadcasting*, 436 U.S. at 796-97; see also *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

In short, the court of appeals decision misapplied the requirement of narrow tailoring and thus, as Chief Judge Wald wrote, "impermissibly overturns a considered congressional judgment as to the appropriate means of assuring diversity of viewpoint over the national airwaves." Thus misused, the narrow tailoring

requirement erects a barrier that few if any affirmative action programs can surmount, regardless of whether those programs advance diversity of broadcast viewpoint, diversity in other contexts, or remediation of past discrimination. The court of appeals' misconstruction of that criterion warrants review by this Court.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 30, 1989

## **APPENDIX**

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**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued January 8, 1986

Decided March 31, 1989

No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

ASTROLINE COMMUNICATIONS Co., INTERVENOR

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Appeal from an Order of the  
Federal Communications Commission

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*Harry F. Cole* was on the brief for appellant.

*C. Grey Pash, Jr.*, Counsel, Federal Communications Commission, with whom *Jack D. Smith*, General Counsel, and *Daniel M. Armstrong*, Associate General Counsel, Federal Communications Commission, were on the brief, for appellee.

Lee H. Simowitz, with whom Thomas A. Hart, Jr., and Marilyn M. Sraileman were on the brief, for intervenor Astroline Communications Company.

Andrew Jay Schwartzman was on the brief for *amici curiae* Department of Communications of the Capital Region Conference of Churches, et al., urging affirmance.

David Honig was on the brief for *amici curiae* National Black Media Coalition, et al., urging affirmance.

Before: WALD, Chief Judge, SILBERMAN, Circuit Judge, and MACKINNON, Senior Circuit Judge.

Opinion PER CURIAM.

Separate Opinions filed by Circuit Judge SILBERMAN and Senior Circuit Judge MACKINNON.

Dissenting Opinion filed by Chief Judge WALD.

PER CURIAM: The opinions by Judges Silberman and MacKinnon in some respects differ in analysis. However, both conclude that the FCC's minority distress sale program unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote programming diversity. Specifically, the program unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interests it seeks to vindicate.

The cause is remanded to the Federal Communications Commission for further proceedings not inconsistent with this opinion.

*Judgment accordingly.*

SILBERMAN, Circuit Judge: Alan Shurberg, a long-time resident of the Hartford, Connecticut area, and Shurberg Broadcasting Company of Hartford, Inc., have been trying since 1982 to replace Faith Center, Inc., as the licensee of Channel 18 in Hartford. Shurberg appeals from an FCC Memorandum Opinion and Order granting Faith Center permission to sell its broadcast properties to a minority-controlled enterprise pursuant to the Commission's distress sale policy. After Faith Center's second unsuccessful attempt at a distress sale, Shurberg sought to file with the FCC a construction application that was mutually exclusive of Faith Center's renewal application and to have his application set for comparative hearing with Faith Center's renewal application. As the FCC could grant either Shurberg's request for comparative consideration or Faith Center's petition for permission to assign its broadcast license to a third distress sale buyer—intervenor Astroline Communications Company Limited Partnership ("Astroline")—but not both, the FCC considered the two requests together. Deciding in favor of Faith Center, the FCC gave slightly greater weight to its distress sale policy than to the statutory policy favoring competition in licensing. *Faith Center, Inc.*, 99 F.C.C.2d 1164, 1170 (1984). The Commission also held that the racial preference embodied in the distress sale policy did not violate the Constitution because the policy was meant to remedy past discrimination and to promote diversity of ownership and programming. *Id.* at 1170-72. And the Commission sustained the *bona fides* of Astroline's minority status, dismissing Shurberg's contention that Astroline's purported minority ownership was a sham. *Id.* at 1172-73.

Our resolution of Shurberg's appeal in this matter has been delayed for some time. After oral argument in this case, developments in a related case, *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), led us to ask the FCC if it still fully supported the constitutionality of its distress

sale policy. The Commission acknowledged that it had doubts and requested that we remand in order for it to reconsider the matter fully. In the midst of that reexamination, however, Congress passed and the President signed a continuing resolution forbidding, *inter alia*, the expenditure of funds for reconsideration of the distress sale policy. The Commission promptly terminated its proceedings and reinstated the policy, and therefore we must now consider Shurberg's challenges.

Shurberg argues that: the FCC's decision is inconsistent with the governing statute, regulations, and judicial precedents, which he asserts required the Commission to consider his competitive application; the FCC's proceedings were marred by *ex parte* contacts and other irregularities; the distress sale policy unconstitutionally discriminated against him on the basis of race. I discern no substantive or procedural flaw in the FCC's action in this case that would require reversal if the agency's distress sale policy were constitutional. I nevertheless vote to overturn the Commission's decision because I have concluded, for the reasons set forth below, that the distress sale policy, as applied to bar Shurberg's opportunity to compete for the license, is unconstitutional.

#### I.

##### A.

As a general rule, a licensee whose qualifications to hold a broadcast license come into question may not assign or transfer that license until the FCC has resolved its doubts in a noncomparative hearing. This policy is premised on the notion that "a licensee . . . has nothing to assign or transfer unless and until he has established his own qualifications . . . ." *Northland Television, Inc.*, 42 Rad. Reg.2d (P&F) 1107, 1110 (1978); see also *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964). The distress sale policy is an exception to that general rule, developed initially as a way of avoid-

ing time-consuming hearings when expeditious action to oust the licensee was desirable—for example, when the licensee was bankrupt or disabled. See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 983 (1978) ("1978 Policy Statement"); see generally *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1028-29 (D.C. Cir. 1981). The policy allows one whose license has been designated for revocation hearing, or whose renewal application has been designated for hearing, to assign his license to an FCC-approved assignee. See *id.*

In 1978, the FCC expanded the applicability of the distress sale policy. It would continue to be available "in circumstances similar to those now obtaining," but, in addition,

in order to further encourage broadcasters to seek out minority purchasers, [the FCC would] permit licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues . . . to transfer or assign their licenses at a "distress sale" price to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other qualifications.

1978 Policy Statement, 68 F.C.C.2d at 983 (footnote omitted). A holder whose license the FCC indicated it might terminate or refuse to renew due to basic qualification issues would be eligible, with FCC approval, to sell its assets and transfer its license to a qualified minority enterprise.<sup>1</sup> Licensees have a substantial incentive to

<sup>1</sup> The FCC has stated that a qualified minority enterprise is one that meets the Commission's basic qualifications and in which the minority ownership interest exceeds 50% or is controlling. See *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 853 (1982) ("1982 Policy Statement"). A special policy applies to limited partnerships: If there is a general partner

exercise this option, because once a license has been designated for a revocation hearing, a licensee may not transfer the license other than through a distress sale. See *Northland Television, Inc.*, 42 Rad. Reg.2d at 1110. The licensee may either gamble that he will prevail in the noncomparative hearing or make an early exit via a distress sale, which will allow him to salvage some portion of the license's value. The distress sale price, to be approved, must be no higher than seventy-five percent of the station's and license's combined fair market value. This cap ensures the distress sale will involve a substantial loss for the licensee—and a substantial discount for the purchasers. See *Grayson Enterprises, Inc.*, 47 Rad. Reg.2d (P&F) 287, 293 (1980).<sup>2</sup>

#### B.

This case has a long and complicated procedural history that reaches back to a period before the proceedings on Faith Center's Hartford license and forward beyond the time of oral argument here. In addition to the Hartford license, Faith Center also held broadcast licenses for three California stations. In 1978, the FCC designated Faith Center's renewal application for its San Bernardino station for hearing because of allegations of fraud in Faith Center's over-the-air solicitation for funds and failure to cooperate with an FCC investigation. In 1980, the Administrative Law Judge in the San Bernardino proceeding dismissed Faith Center's renewal application because

who is a minority with a 20% interest in the partnership, the enterprise qualifies as one with "significant minority involvement." *Id.* at 855.

<sup>2</sup> The distress sale policy is not without attraction to the station owner whose license has been designated for hearing. By selling his station, even at a 25% discount, the owner avoids the "costs of a renewal hearing and the risk of a revoked license." Comment, *FCC Minority Distress Sale Policy: Public Interest v. The Public's Interest*, 1981 WISC. L. REV. 365, 366 (1981).

of Faith Center's refusal to cooperate in the proceeding. The Commission affirmed that decision, as did this court. *Faith Center, Inc.*, 82 F.C.C.2d 1 (1980), *reconsid. denied*, FCC 81-235 (1981), *aff'd mem.*, *Faith Center, Inc. v. FCC*, 679 F.2d 261 (1982), *cert. denied*, 459 U.S. 1203 (1983).

In December 1980, the FCC designated Faith Center's renewal application for its WHCT-TV Channel 18 license in Hartford for noncomparative hearing. Faith Center had filed a renewal application in 1977, but it had been held in deferred status pending the outcome of the San Bernardino proceedings. After the San Bernardino proceedings were dismissed, the FCC reactivated the Hartford proceedings to consider issues left unresolved in the San Bernardino proceedings. The FCC's order reactivating the Hartford proceedings acknowledged Faith Center's interest in making a distress sale, which it could do while its application was in designated-for-hearing status, but not while in deferred status.

Faith Center filed with the FCC, in February 1981, a petition for special relief requesting permission to make a distress sale to Television Corp. of Hartford. The FCC granted the petition and the renewal application on condition that the proposed assignee be "found fully qualified . . . and that the contemplated assignment is in fact consummated within 90 days following such determination." *Faith Center, Inc.*, 88 F.C.C.2d 788, 795 (1981). The FCC's order further stated, "[s]hould either condition not occur, this proceeding will return to its status prior to the filing of the above described Petition for Special Relief." *Id.* The proposed sale to Television Corp., however, was not consummated, and the application was withdrawn. On September 29, 1982, Faith Center again petitioned for special relief, seeking approval for a distress sale to Interstate Media Corp. The FCC again granted Faith Center's petition and application—this time over the opposition of Shurberg and others—

and again conditioned its approval upon the proposed assignee's being found fully qualified and upon the sale's being consummated within ninety days of the qualification determination. If either of these conditions failed, the application was to revert to its prior designated-for-hearing status.

Shurberg, on December 1, 1983, filed an application for a construction permit to build a television station in Hartford, an application that would be mutually exclusive with the Channel 18 renewal application. The FCC rejected this filing on the ground that its regulations precluded it from accepting applications in competition with designated-for-hearing renewal applications until the resolution of the noncomparative proceedings. See 47 C.F.R. § 73.3516(e) (1987); *City of Angels Broadcasting v. FCC*, 745 F.2d 656, 662-64 (D.C. Cir. 1984).

In February and April of 1984, Faith Center and Interstate Media informed the FCC they could not consummate the proposed distress sale. Faith Center said, however, that it had "an excellent opportunity to consummate an assignment to other minority parties," and it requested another chance to pursue a distress sale. Letter from Kenneth E. Robertson (Counsel for Faith Center) to Allan Glasser (FCC Mass Media Bureau), March 29, 1984. Faith Center's renewal application reverted to designated-for-hearing status, and the ALJ scheduled a prehearing conference. On April 19, 1984, Shurberg in turn filed a petition for extraordinary relief requesting that the construction permit application he had attempted to file in December 1983 be designated for comparative hearing with Faith Center's renewal application. Then on June 25, 1984, before the FCC had acted on Shurberg's petition, Faith Center petitioned the Commission for approval of a distress sale to Astroline. The FCC's General Counsel solicited comments from all parties on the conflicting requests for relief. Astroline, the Department of Communications of the Capital Region

Conference of Churches, and the FCC's Mass Media Bureau submitted comments in favor of the distress sale; Shurberg recorded his opposition to the sale and urged his application be set for comparative hearing.

The Commission announced its decision on the petitions for relief in a Memorandum Opinion and Order released December 7, 1984. *Faith Center, Inc.*, 99 F.C.C.2d 1164. It first addressed Shurberg's argument that he was entitled to a comparative hearing against Faith Center's renewal application because the FCC's September 1983 order regarding the second proposed distress sale had granted Faith Center's renewal application and thereby opened a "window" for the filing of competitive applications. See 47 C.F.R. §§ 73.3516(c), (e), 73.3539 (1987). The Commission also rejected Shurberg's argument that *New South Media Corp. v. FCC*, 685 F.2d 708 (D.C. Cir. 1982), required the Commission to grant its request for a comparative hearing. 99 F.C.C.2d at 1168-70. It did note, however, that if Faith Center failed to accomplish the distress sale on its third try, the FCC would require Faith Center to file a supplemental renewal application. This would operate to open a window for all competitive applications, including Shurberg's. 99 F.C.C.2d at 1170.

Shurberg's argument that the distress sale policy violated his constitutional right to equal protection was rejected by the Commission as "without merit." In reaching that conclusion, the FCC relied both on its findings of "underrepresentation" of minorities in the broadcast industry and its view that increased minority ownership would increase programming diversity. *Id.* at 1170-71. The Commission also drew support from the 1982 amendments to the Communications Act in which Congress had approved the use of a lottery system that incorporated significant preferences for minority applicants as an alternative to the comparative hearing process. *Id.* at 1171-72. The conference report accompanying those amendments contained a statement that "the effects of past

inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H.R. REP. No. 765, 97th Cong., 2d Sess. 43 (1982). Noting that the conference report also referred to the FCC's 1978 policy statement, which expanded the distress sale policy, in establishing the need for preferential treatment of minorities, the Commission reasoned that "Congress . . . has recognized the need for and approved the implementation of the minority ownership policies set forth in the 1978 policy statement." 99 F.C.C.2d at 1172.

Shurberg also failed in his attack based on Astroline's qualifications as a *bona fide* minority to participate in a distress sale. The Astroline partnership had two general partners and one limited partner. Richard P. Ramirez, the general partner whose Hispanic surname was the predicate for Astroline's participation in the distress sale as a minority enterprise, held a twenty-one percent ownership interest and a seventy percent voting interest in the partnership. WHCT Management, Inc., the second general partner, held a nine percent ownership interest and a thirty percent voting interest. Astroline Co.—not to be confused with the Astroline partnership—owned the remaining seventy percent of the company. The Astroline partnership represented to the FCC that the general partners would control the partnership's affairs and would vote in accordance with their respective partnership interests. Shurberg attacked the *bona fides* of this arrangement, pointing to records indicating Ramirez had contributed less than one percent of the station's operating capital; Shurberg asserted it was patently incredible that such a small contributor would be given control of the enterprise. Shurberg alleged that Ramirez was included in the partnership only as a device to permit the real party in interest, Astroline Co., to partici-

pate in the distress sale. The Commission determined, however, the Astroline partnership satisfied the basic requirements of minority control. *Id.* at 1173.

Shurberg filed this petition for review.<sup>a</sup> Thereafter, this court issued its decision in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), which involved the FCC's policy of extending preferential treatment to female applicants in comparative hearings for FM radio station licenses. A majority of the panel held the preferences invalid as exceeding the FCC's statutory authority. The court *en banc* subsequently vacated the panel opinion and set the case for rehearing. The FCC requested, however, that we remand the case without considering the merits to allow the FCC to reconsider the basis for those preferences, since in the meantime it had "concluded that race, sex or national origin *per se* should not be a basis for licensing determinations." Accompanying its motion for remand, the Commission filed a lengthy brief on the merits—in the event we might deny its motion and reach the merits—apparently conceding that its race and gender preferences violated the Constitution. We remanded the case, in October 1986, to allow the FCC to reexamine the bases of its racial and gender preference policies.

In light of these developments, we asked the FCC to file a supplemental brief in this case clarifying its position on the constitutionality of the minority distress sale provision. Instead of filing a brief, the Commission responded that the "distress sale policy raises many of the same questions that are present in the *Steele* case," and requested a remand to allow inquiry into the distress sale policy along with consideration of the comparative preference policies raised in *Steele*. We granted the motion and remanded the record in June 1987.

<sup>a</sup> This court has jurisdiction pursuant to section 402(b) of the Communications Act, 47 U.S.C. § 402(b) (1982).

On December 22, 1987, the President signed into law a continuing resolution appropriating funds for the federal government for fiscal year 1988. Pub. L. No. 100-202, 101 Stat. 1329 (1987). Among its provisions was the following:

That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended 52 R.R.2d 1313 (1982) [sic<sup>4</sup>] and *Mid-Florida Television Corp.*, 60 F.C.C.2d 607 Rev. Bd. (1978) [sic<sup>5</sup>], which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry . . . .

In compliance with this provision, the FCC ended reconsideration of its comparative preference and distress sale policies, without issuing any conclusions, and announced it would reinstate such policies as they existed prior to September 12, 1986. See, e.g., *Faith Center, Inc.*, 3 F.C.C. Rcd. 868 (1988).

Shurberg promptly moved the court for expedited resolution on the merits. Shurberg noted that the case was fully briefed and argued more than two years ago, and that the termination of the *Steele* inquiry precluded any further evolution of the case. We granted the motion in part, agreeing to render our decision on the merits in

<sup>4</sup> 52 Rad. Reg.2d (P&F) 1301 (1982).

<sup>5</sup> 69 F.C.C.2d 607 (Rev. Bd. 1978).

the normal course of business. The FCC's request for a remand to allow it to reexamine the distress sale policy, as well as its brief in *Steele*, suggested that it may now essentially agree with Shurberg's constitutional arguments.

On the other hand, I also recognize that the FCC's brief in *Winter Park Communications v. FCC*, Nos. 85-1755 and 85-1756, (D.C. Cir. argued Nov. 21, 1988) is supportive of the Commission's minority preference policy as used in its comparative licensing procedures. The FCC asserted that approach is constitutional because it is based on the compelling government interest in the enhancement of diversity of programming—a contention which appears inconsistent with its brief in *Steele*. Still, in *Winter Park*, the FCC argued that its policy was narrowly tailored because "race is one of several factors to be considered rather than a decisive factor in and of itself." Therefore, since race is only one consideration among many in the comparative license practice challenged in *Winter Park*, it is distinguishable from the distress sale policy in *Shurberg*. See *infra* at 22-23, 45-47.<sup>6</sup>

The continuing resolution apparently has prevented the formal expression of any further views by the FCC in this case, and the distress sale policy, reinstated by the FCC, is still operative and has an effect on Shurberg's interests. We therefore must consider his challenge, looking to the various briefs, which paradoxically include both the FCC's defense and repudiation of its policy.

## II.

Turning first to Shurberg's nonconstitutional challenge to the Commission's action, the major issue presented is the propriety of the Commission's decision that Shurberg

<sup>6</sup> I express no opinion as to the validity of the minority preference policy in the comparative license practice raised in *Winter Park*.

was not entitled to a comparative hearing. Giving appropriate deference to the FCC's construction and application of its rules, see *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 30 (D.C. Cir.) (en banc), cert. denied, 107 S. Ct. 330 (1986), I discern no basis for overturning the FCC's determination on this ground.<sup>7</sup>

The Communications Act of 1934, as amended, provides that licenses in hearing status shall remain in effect pending final disposition of the hearing. See 47 U.S.C. § 307(c). The FCC's regulations, moreover, provide that the Commission will not accept competitive applications after a certain time, in order to allow the Commission to designate renewal applications for hearing and to conduct such hearings in an orderly fashion. See 47 C.F.R. § 73.3516(e) (1987); *City of Angels Broadcasting v. FCC*, 745 F.2d 656, 662-64 (D.C. Cir. 1984). In my view, the Commission properly applied the statute and its regulations when it refused to accept Shurberg's competitive application while a hearing on Faith Center's qualifications was pending. Shurberg argues that the posture of Faith Center's renewal application was really more akin to deferred status than to designated-for-hearing status and under the rule of *New South Media*, 685 F.2d 708, the substance and not the form of a license's status is controlling. As I have mentioned, designated-for-hearing applications are protected from competitive filings, but deferred applications are not. Deferred applicants are required to submit supplemental renewal applications at every interval during the time of their deferred status when a regular renewal application would be due. And those supplemental filings operate to open a window for competitive applications.

In *New South Media*, the FCC had granted several renewal applications conditioned upon the outcome of a

<sup>7</sup> The dissent, although agreeing with the FCC that this issue presents a "close question," seems to concur on this point, dissent at 3 n.3; otherwise the dissent presumably would not reach the constitutional question.

comparative renewal proceeding involving another of the licensee's licenses. Later the FCC denied renewal of that other license and decided to hold noncomparative hearings to determine how to treat the conditionally renewed licenses. Instead of waiting for the remaining licenses to expire and evaluating each at that time against competing applications, the Commission decided to reopen the earlier conditional renewals by designating those applications for hearing. *Id.* at 710. As the hearings were to begin after completion of all court appeals involving the unrenewed license, the FCC could fix no specific date for the hearings. This court overturned the FCC's decision to hold the applications in designated-for-hearing status, shielded from competition for an interval longer than the license period itself. We found the situation analogous to that in *Carlisle Broadcasting Associates*, 59 F.C.C.2d 885 (1976), in which the FCC ruled that when a renewal application had remained in deferred status for three years (which was the license term), the Commission would entertain competing applications. See *New South Media*, 685 F.2d at 716. Between the time the FCC had designated the licenses for hearing and the completion of the judicial appeals involving the non-renewed license, "all but one of the thirteen license renewals [had] run well beyond three years, with no renewal hearing ongoing at the Commission, no evidence-taking underway, no proceeding in midstream or even launched." *Id.* We said: "In fact then, if not in form, the extended 'conditional renewals' in this case are like the renewal deferred for three years in *Carlisle*." *Id.*

Shurberg argues that under *New South Media* the mere designation of a hearing is not sufficient to preclude competing applications, that there must actually be an ongoing renewal proceeding which would otherwise be hampered. Faith Center's attempts to consummate a distress sale, it is asserted, cannot themselves be regarded as "administrative activity" sufficient to justify the Com-

mission's treatment of the Faith Center renewal proceeding as ongoing.

I disagree with Shurberg's view of *New South Media's* bearing on this case. *New South Media* treated the absence of ongoing administrative proceedings as a factor militating against keeping the renewal applications in protected status, but did not rule out the possibility that other interests might warrant continued protection against competitive applications. That competitive applications might disrupt ongoing proceedings is only one facet of a larger concern for administration of the FCC's mandate. For the distress sale policy to work, the FCC must have the discretion to hold a renewal application in designated-for-hearing status long enough to permit the licensee to explore the possibility of such a sale. In this case, the FCC exercised its discretion to hold the application in designated-for-hearing status not once, but three times. All in all, the application was in deferred status for over three years and then in designated-for-hearing status for four years. Admittedly, that is a long time for competitors to be precluded from filing their applications, but I do not see here the total absence of administrative activity that was apparent in *New South Media*. The Commission's efforts to allow Faith Center to avail itself of an FCC policy were not so unreasonable as to require reversal.

As Shurberg acknowledges, *New South Media* recognized that not all limitations on the *Ashbacker* policy of favoring competition are impermissible, especially insofar as they advance the FCC's orderly administration of its work. See 685 F.2d at 716. If the distress sale policy were constitutional, it would present sufficiently weighty grounds for a limited exception to the *Ashbacker* policy. Because an agency's balancing of competing policy considerations is entitled to considerable deference from a court, *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984), I would be obliged

to respect the Commission's decision to implement the distress sale policy despite attendant delays. Accordingly, I do not quarrel with the Commission on this basis.<sup>8</sup>

### III.

Shurberg challenges the distress sale policy as *ultra vires* on both statutory and constitutional grounds. We are, of course, normally obliged to consider the statutory question first—whether the policy exceeds congressional authorization—and I am mindful of the maxim that we construe statutes narrowly to avoid constitutional infirmities. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Still, the Commission operates under a broad statutory mandate to consider the “public interest, convenience and necessity.” 47 U.S.C. § 309(a) (1982). Congress has not disapproved the use of racial preferences as a means of carrying out the Commission's view of the “public interest,” and has, in fact, authorized their use in certain licensing decisions. See 1982 Amendments to the Communication Act of 1934, 47 U.S.C. § 309(i)(3)(A). I think, therefore, that the FCC did not exceed its statutory authority when it adopted the distress sale policy.

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<sup>8</sup> I also reject Shurberg's argument that the FCC's proceedings were fatally tainted by *ex parte* communications and other irregularities. None of the alleged communications warrants a remand. FCC regulations prohibit only *ex parte* communications “directed to the merits or outcome of a proceeding.” 47 C.F.R. § 1.1202(a) (1987). Only one of the alleged communications, a memorandum to the Commissioners from a non-decisionmaking employee, went to the merits of the Faith Center proceeding. The Commission has since included that memorandum in the record of this proceeding. It is obvious from reading the memorandum that the Commission's failure to make it public before it acted did not harm Shurberg in any meaningful respect. See *PATCO v. Federal Labor Relations Authority*, 685 F.2d 547, 564-65 (D.C. Cir. 1982).

## A.

The constitutional issue is whether or not the distress sale policy, by creating a preference for minority purchasers, violates the equal protection component of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Supreme Court has struggled with the constitutionality of government-sponsored minority preferences four times in the last ten years,<sup>9</sup> in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); and *City of Richmond v. J.A. Croson Co.*, 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989). Those cases have produced twenty-three opinions (some of which do not reach the constitutional issue). In their aftermath, I would be less than candid not to concede that discerning and applying constitutional principles in this area is difficult; in none of the first three cases does a majority of the Court join any one opinion. Under these circumstances, a lower federal court must do its level best to extract the holding that commanded a majority in each case to arrive at the governing principles and limitations. See *Marks v. United States*, 430 U.S. 188, 193 (1977). In *Croson*, a majority of the Court did agree on the requirements for the constitutionality of a state or local affirmative action program. That opinion provides more guidance than the earlier cases, but the contours of its reasoning must still be fleshed out in future cases. I begin by briefly reviewing the four cases.

*Bakke* struck down a university admissions policy that set aside a fixed percentage of each class for minority candidates. In the majority, only Justice Powell's opinion

<sup>9</sup> A fifth case, *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986), is distinct both because it involved a court-ordered remedy to discrimination and because it dealt primarily with Title VII.

reached the constitutional issue, and in discussing the possible justifications for the admissions program, he firmly rejected the notion that a racial classification could be based on a mere desire to assure that the student body contained specified percentages of particular racial and ethnic groups. 438 U.S. at 307. He also rejected the use of a preference as a remedy for past discrimination, because the university had not made any findings of discrimination, and indeed was not competent to make such findings. *Id.* at 307-309. Justice Powell's opinion, however, did recognize that an academic institution has a compelling interest in promoting a diverse educational environment. *Id.* at 311-14. Bringing together students from diverse ethnic and cultural backgrounds allows them "to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." *Id.* at 313 n.48 (citation omitted). Racial diversity is a legitimate aspect of a diverse student body, but it is only one part of the "genuine diversity" that is a compelling state interest. *Id.* at 315. Thus, the university could have used race as one factor in a multi-factor admissions decision. But simply employing a racial set-aside was inconsistent with the attainment of "genuine diversity," an interest that would necessarily require consideration of factors other than race. See *id.* at 315-18.

*Fullilove* is the only case in which the Court has sustained the constitutionality of a governmentally-imposed minority preference not occasioned by a court's remedial action.<sup>10</sup> The Court considered a *facial* challenge to the constitutionality of a set-aside provision in an Act of Congress authorizing funding for public works construc-

<sup>10</sup> Court-ordered racial classifications have been sustained when used to remedy proven discrimination. See, e.g., *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

tion.<sup>11</sup> In his plurality opinion, Chief Justice Burger stressed Congress' special constitutional authority under the Fourteenth Amendment to enact measures to remedy past discrimination. See 448 U.S. at 472-78. Justice Powell's concurrence also stressed that Congress had made the finding of past discrimination and that Congress had selected the particular remedy. See *id.* at 503-06 (Powell, J., concurring). The evidence before Congress demonstrated specific practices in the public procurement process that resulted in discrimination or an exacerbation of the effects of past discrimination. See *id.* at 477-78 (plurality); *id.* at 506 (Powell, J., concurring). Of key importance, it seems to me, was the Court's determination that the set-aside was narrowly tailored to its remedial purpose. The Court prominently discussed features of the legislative history, *id.* at 463-67, and of the implemented program, *id.* at 486-88. The program was designed by Congress to assure that preference would be awarded only to *disadvantaged* minority enterprises: those enterprises that could show in the face of challenge that they were continuing to suffer the competitive effects of past discrimination (albeit discrimination not necessarily directed specifically at them). The Court also emphasized that the set-aside was likely to impose only a slight burden on nonminorities since its reach was small in proportion to the overall amount of funds expended in the construction industry and because the effects were diffused rather than concentrated on particular individuals. See *id.* at 484 n.72; *id.* at 514-15 (Powell, J., concurring).

<sup>11</sup> The plaintiffs in *Fullilove* did not seek damages or other specific relief for injuries caused by the application of the program, but only declaratory and injunctive relief striking down the program *in toto*. *Fullilove*, 448 U.S. at 480-81 & n.71. The Court was not asked to consider the fairness of the burden borne by particular individuals; it observed that "questions of specific application must await future cases." *Id.* at 486.

In *Wygant*, the Court held unconstitutional a school layoff policy that accorded minority teachers a preference over nonminorities with seniority. As Justice O'Connor concurred in the Court's judgment on narrow grounds and no other opinion was joined by five justices, one may take Justice O'Connor's separate concurrence, and those parts of Justice Powell's opinion in which she also concurred, to represent the holding of the Court. See *Marks v. United States*, 430 U.S. 188, 193. The Court found that the school board had failed to establish the necessary factual predicate—i.e., evidence of past discrimination—for remedial action. See 476 U.S. at 277-78. The Court, however, relaxed its previous requirement that the governmental body make "findings" of discrimination. Recognizing that such findings might subject a government to liability, the Court authorized preferences to be predicated on substantial evidence of discrimination. *Wygant*, 476 U.S. at 289-92 (O'Connor, J., concurring). Flatly rejected, though, as a legitimate justification for the preferences was the school's asserted need to provide minority role models; such a theory, the Court maintained, has "no logical stopping point." *Id.* at 275-76. Essentially, the Court (Justice O'Connor) held that the layoff provision was not narrowly tailored to achieve its remedial purpose, because the hiring goal that the provision was designed to protect was calculated as a ratio of black teachers to black students, rather than as a ratio of black teachers to qualified minority teachers within the relevant labor pool. *Id.* at 294.

*Croson*, the Court's most recent pronouncement, held unconstitutional Richmond's Minority Business Utilization Plan, which required prime contractors awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to one or more "Minority Business Enterprises." The Court ruled that a racial preference, at least when implemented by a state or local government, is subject to "strict scrutiny" review

under the Equal Protection Clause. *Croson*, 57 U.S.L.W. at 4139; *id.* at 4146 (Scalia, J., concurring). Given this standard of review, the Richmond plan was not supported by a sufficient factual predicate for remedial action. The City Council's evidence was deficient, because "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.* at 4140. In particular, the Court ruled that mere assertions of a "benign" purpose for the racial classification were "entitled to little or no weight," *id.*, and that a comparison between the number of prime contracts awarded to minority firms and the minority population of the city (as opposed to the number of qualified minority firms) is inappropriate. *Id.* at 4141. The Richmond plan also failed the test of narrow tailoring because there had been no "consideration of the use of race-neutral means to increase minority business participation in city contracting," *id.* at 4142, nor did the plan provide for an "inquiry into whether or not the particular MBE seeking a racial preference ha[d] suffered from the effects of past discrimination . . . ." *Id.* at 4143.

Some general propositions may be gleaned from these four cases. Governmentally-imposed minority preferences are constitutionally permissible under certain limited circumstances, but they may not be based on the desirability *per se* of achieving racial balance or proportional representation of minorities in selected institutions. The Court has recognized that the objective of remedying past discrimination may justify the use of minority preferences, see *Fullilove*, 448 U.S. at 475, and at least one Justice has viewed promoting diversity in an educational context as a second compelling state interest. See *Bakke*, 438 U.S. at 311-15 (opinion of Powell, J.).

The nature of the evidence required to establish the existence of prior discrimination varies with the authority of the governmental body imposing the remedial pref-

erence. See *Fullilove*, 448 U.S. at 515 n.14 (Powell, J., concurring). Congress is clearly the institution with the most latitude to make findings of discrimination and authorize remedies on the basis of the evidence before it. See *Croson*, 57 U.S.L.W. at 4137-38; *Fullilove*, 448 U.S. at 472, 483; *id.* at 499-502 (Powell, J., concurring).<sup>12</sup> A state or local government must have stronger evidence of discrimination before it can employ racial classifications, *Croson*, 57 U.S.L.W. at 4138, and that evidence must "approach[] a prima facie case of a constitutional or statutory violation." *Id.* at 4140.

Assuming the factual predicate for remedial action by any governmental body has been established, a reviewing court must still ensure that the use of race is narrowly tailored to the remedial purpose. *Croson*, 57 U.S.L.W. at 4142; *Wygant*, 476 U.S. at 274. Most important, a racial preference plan must allow for case-by-case consideration of applicants to ensure that each minority has in fact suffered from the effects of past discrimination. See *Croson*, 57 U.S.L.W. at 4137, 4142-43; *Fullilove*, 448 U.S. at 486-87. The preference also must be structured in a way that minimizes the burden on nonminorities, so that innocent people are not asked to shoulder an undue share of the cost of remedying discrimination. *Wygant*, 476 U.S. at 282-84; *Fullilove*, 448 U.S. at 514-15 (Powell, J., concurring). When a remedy is limited and properly tailored, some sharing of the burden by innocent third parties may be unavoidable and does not render a remedial program unconstitutional. See *Fullilove*, 448 U.S. at 515 (Powell, J., concurring); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 774-75 (1976). But the government's compelling need to employ a race-conscious remedy must

<sup>12</sup> For a discussion of Congress' special role under the enforcement provision of the Fourteenth Amendment, see Nathanson, *Congressional Power To Contradict the Supreme Court's Constitutional Decisions: Accommodation of Rights in Conflict*, 27 WM. & MARY L. REV. 331, 356-57 (1986).

outweigh the unfairness to innocent nonminorities. See *Fullilove*, 448 U.S. at 515 (Powell, J., concurring).

Aside from remedying past discrimination, the only other state interest heretofore identified in a Supreme Court opinion and upheld as sufficiently compelling to support race-conscious policies is the promotion of diversity in a school's student body. *Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.). In *Bakke*, Justice Powell emphasized the special role and characteristics of institutions of higher learning and the First Amendment protections afforded them. *Id.* at 312-13. Pursuit of diversity, in his view, is a compelling basis for affirmative discrimination only in circumstances and settings, such as those found in academia, where "a countervailing constitutional interest, that of the First Amendment," in the selection of students "is of paramount importance in the fulfillment of [the institution's] mission." *Id.* at 313. Seeking racial or ethnic diversity for its own sake in a governmental or government-regulated institution has been soundly rejected. It is synonymous with the illegitimate objective of racial balance or proportional representation and is thus equivalent to "discrimination for its own sake." *Id.* at 307. Preferring minorities in order to create role-models has been similarly rejected because it too leads inexorably to explicit racial balancing. See *Wygant*, 476 U.S. at 274-76; *Britton v. South Bend Community School Corp.*, 819 F.2d 766, 767-68 (7th Cir.) (en banc), cert. denied, 108 S. Ct. 288 (1987). The goal of racial diversity might be compelling then only when that greater diversity itself serves one of society's fundamental goals. See *Bakke*, 438 U.S. at 311-15.

Even if the government is seeking racial diversity for a legitimate educational purpose, a court must still ask if the form and manner of the racial classification used is appropriate to achieve that purpose—again, whether the race-conscious measure is narrowly tailored. *Id.* at 315. The constitutional test for "narrow tailoring" ap-

pears to be slightly different when the government's justification for a racial preference is the promotion of diversity (so far recognized only in an academic setting) rather than the remedy of past discrimination. The Court has rejected the use of minority set-asides as a means of promoting diversity. See *id.* at 315-18. Because ethnic (or racial) origin is just one of many factors that combine to create "genuine diversity" in an educational environment, the state's interest is better promoted when ancestry is one element of a multi-factor evaluation that takes into consideration a variety of characteristics and attributes. *Id.* According to the Court (Justice Powell), the crucial requirement for a program that uses a racial preference to enhance legitimate diversity is that each applicant must receive individualized consideration. *Bakke*, 438 U.S. at 318 & n.52.

The FCC appears to justify its policy both as a means to foster diverse programming and as a remedy for past discrimination. Although the Commission's brief emphasizes that the distress sale policy is "based principally" on its authority to promote diversity of programming, and the dissent suggests that the policy rests "exclusively on the diversity rationale," dissent at 42, I feel obliged to address the remedial justification as well.<sup>13</sup> In its Memorandum Opinion and Order that rejected Shurberg's constitutional claims, the agency also relied on the remedial justification, arguing that preferential treatment of minorities was needed to address the "underrepresentation of minorities" in the broadcasting industries. *Faith*

<sup>13</sup> The dissent appears to agree, albeit for different reasons, that the distress sale policy cannot be sustained as a remedial program. See dissent at 3, 42. That is not entirely clear, however, since at other times the dissent characterizes the distress sale policy as "an effort to remedy the effects of past discrimination," *id.* at 18, and relies on "the broad remedial powers of Congress." *Id.* at 19.

*Center, Inc.*, 99 F.C.C.2d at 1171. It further cited congressional statements that minority underrepresentation was the result of past racial and ethnic discrimination, and discussed the remedial power of Congress. *Id.* at 1171-72. I treat the remedial justification first, because constitutional law is more fully developed on that subject than it is with respect to the pursuit of diversity.

## B.

The Court in *Croson* reaffirmed the plurality's view in *Wygant* that, when considering actions by state and local governments, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Croson*, 57 U.S.L.W. at 4140 (quoting *Wygant*, 376 U.S. at 276). In dicta, however, three members of the majority read *Fullilove* to mean that, in certain circumstances, Congress, in the exercise of its powers under section five of the Fourteenth Amendment, could constitutionally "identify and redress the effects of society-wide discrimination." *Croson*, 57 U.S.L.W. at 4138. If we are to conclude that the FCC has provided a sufficient factual predicate for the distress sale policy, we must rest on that dicta, because the indications of past discrimination used by the FCC to justify its program are only of the most general nature. Four years after the FCC implemented its distress sale policy, Congress commented that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the mass media communication, as it has adversely affected their participation in other sectors of the economy as well." H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 43 (1982) (emphasis added). The report cited statistics showing that minority-owned broadcasting stations accounted for less than two percent of commercial broadcasting stations. *See id.* The FCC had made similar findings of minority "under-

representation" <sup>14</sup> in 1978 in the course of developing its 1978 Policy Statement, 68 F.C.C.2d at 981, which announced the new distress sale policy's minority preference.

Neither Congress nor the FCC ever found any evidence to link minority "underrepresentation" to discrimination by the FCC or to particular discriminatory practices in the broadcasting industry.<sup>15</sup> Indeed, the FCC in its brief in the *Steele* case to the *en banc* court states "[t]here has never been a finding, nor so far as we know even an allegation, that the FCC engaged in prior discrimination against racial minorities or women in its licensing process." Even in its *Winter Park* brief, which seeks to defend a (albeit distinguishable) minority preference policy, the FCC offers no proof of particular discrimination in the broadcast industry. And Congress, in the 1982 conference report, suggested that minority underrepresentation in broadcasting is merely part of the larger phenomenon of minority underrepresentation in certain professions and occupations. As a remedial measure, then, the distress sale policy appears to be based solely on evidence of societal discrimination.

The decision in *Croson* does not clearly explain whether there are any evidentiary requirements imposed by the Fifth Amendment on Congress before it can authorize a remedy for societal discrimination, nor does it define exactly what is meant by "societal discrimination." The Court noted that "Congress made national findings that there has been societal discrimination in a host of fields,"

<sup>14</sup> By "underrepresentation," Congress and the FCC seem to have meant that the percentage of stations owned by minorities was less than the percentage of minorities in the population as a whole.

<sup>15</sup> The Minority Ownership Task Force report, to which the FCC's 1978 Policy Statement refers, suggests that minority entry into the broadcasting industry is primarily hindered by difficulties in obtaining financing. But, minorities' lack of money is not linked to specific discriminatory practices.

*Croson*, 57 U.S.L.W. at 4142, but it is not evident whether all of those findings would support race-conscious remedies, remedies which are "ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276 (plurality opinion). As Justice Kennedy remarked, "[t]he process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition." *Croson*, 57 U.S.L.W. at 4145 (Kennedy, J., concurring).

I do not read the Court's dicta in *Croson* to mean that Congress may act without *some* quantum of particularized evidence of the effects of societal discrimination in the relevant industry, and in that regard the general findings of minority underrepresentation in the broadcasting field differ, in my view, from the congressional findings the Court encountered in *Fullilove*. In that case, Congress had "abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove*, 448 U.S. at 477-78. In the case of broadcasting, the evidence before Congress of the treatment of minorities in the broadcast industry was considerably less particularized. Underrepresentation alone cannot be sufficient proof of the effects of past societal discrimination. There is, of course, the possibility that minorities may be "disproportionately attracted to industries other than [broadcasting]." *Croson*, 57 U.S.L.W. at 4141; see also *Johnson v. Transportation Agency*, 480 U.S. 616, 668 (1987) (Scalia, J., dissenting) (phenomena of discrimination and underrepresentation due to social attitudes are "certainly distinct"). If we were to hold that Congress may authorize a racial set-aside based on the meager evidence presented here, I do not see what would prevent Congress from

mandating proportional racial representation in all publicly-controlled employment opportunities.<sup>16</sup>

Nevertheless, assuming *arguendo* that the broadcasting field has been plagued by the type of "societal discrimination" to which the Court referred in *Croson* and that Congress has the power to authorize its redress, the FCC's program does not conform to the stricture of the Constitution because it is not narrowly tailored to remedy past discrimination. That a remedial preference must be narrowly tailored implies, as I understand the concept, three distinct limitations. The degree of preference must be tied to the effects of past disadvantages or discrimination, see *Fullilove*, 448 U.S. at 486-88; *Croson*, 57 U.S.L.W. at 4137, 4142-43; there must be prior consideration of the use of race-neutral means to increase minority participation, see *Croson*, 57 U.S.L.W. at 4142; *Fullilove*, 448 U.S. at 463-67; *id.* at 511 (Powell, J., concurring); and the burden the preference imposes on innocent third parties must not be unfair. See *Wygant*, 476 U.S. at 282-84; *Fullilove*, 448 U.S. at 484. The distress sale policy is deficient in each respect.

The FCC's policy operates in a manner that bears only a fortuitous relationship to any effects of past disadvantage or discrimination. In *Fullilove*, Congress incorporated a detailed administrative waiver procedure to ensure that the set-aside did not extend beyond its remedial purpose. Under the waiver policy, a contractor could

<sup>16</sup> Recently, the Court suggested that the analysis in *Croson* is relevant to federally-mandated racial preference policies when it vacated for reconsideration in light of *Croson* the Eleventh Circuit's decision in *H.K. Porter Co. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987). See 57 U.S.L.W. 3587 (March 7, 1989). In *H.K. Porter*, the court upheld Dade County's policy of requiring five percent participation by minority business enterprises in the construction of a federally-funded transit system. The Surface Transportation Assistance Act of 1978 made such percentage goals for minority business participation an absolute condition precedent to the receipt of federal funds. See 825 F.2d at 325, 331.

avoid subcontracting with a minority business enterprise at an "unreasonable" price. See *Fullilove*, 448 U.S. at 469-71. An "unreasonable" price was described as "a price above competitive levels which cannot be attributed to the minority firm's attempt to cover costs inflated by the present effects of disadvantage or discrimination." *Id.* at 471. Without this "fine tuning to remedial purpose, the statute would not have 'pass[ed] muster.'" *Croson*, 57 U.S.L.W. at 4137 (quoting *Fullilove*, 448 U.S. at 487). Under the distress sale policy, by contrast, the degree of the preference is not at all tied to disadvantage or discrimination.

The price of the distress sale is set by bargaining between a minority purchaser who is insulated from non-minority competition and a seller who is presumably anxious to salvage some value for his license and assets. The discount to the minority purchaser—in one sense, the degree of the preference—is likely to be substantial. Indeed, in order to preserve some deterrent against violating basic qualification requirements, the Commission prescribes that a distress sale price may not exceed seventy-five percent of the station's fair market value, see *Lee Broadcasting Corp.*, 76 F.C.C.2d 462, 463 (1980), thus guaranteeing the minority purchaser a discount of at least twenty-five percent. In this case, Astroline purchased WHCT at a forty-seven percent of the average appraised value.<sup>17</sup> Any limited partnership with a minority general partner who owns more than a twenty percent share of the partnership may qualify for this preference. See 1982 Policy Statement, 92 F.C.C.2d at 855.

The FCC rules in no way require the preference to be tied to the extent of disadvantage suffered by the minority enterprise. There is no opportunity here to ensure that participating minority enterprises have actually been disadvantaged by past discrimination or its effects. See

<sup>17</sup> The value of the license and other assets of WHCT was appraised three times at an average value of \$6,520,000. The purchase price, however, was only \$3,100,000.

*Croson*, 57 U.S.L.W. at 4143; *Fullilove*, 448 U.S. at 487-89. The Commission apparently found Astroline to be eligible to participate in the distress sale simply because of Ramirez's Hispanic surname.<sup>18</sup> As far as I can tell, there was no procedural mechanism that would allow Shurberg or anyone else with an economic interest in the proceeding to prompt an inquiry into the economic status or the source of any disadvantage of Ramirez or his forebearers, nor did the FCC undertake any such investigation on its own initiative. Cf. *Fullilove*, 448 U.S. at 489 (waiver scheme "gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress"). Under *Fullilove* and *Croson*, ancestry alone<sup>19</sup> cannot be

<sup>18</sup> The need for case-by-case consideration to ensure that participants are truly disadvantaged is highlighted by the groups, in addition to blacks, who are included as "minorities" under the distress sale policy. They include those of Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction. 1978 Policy Statement, 68 F.C.C.2d at 980 n.8. It should be obvious that the scope of the problem for each of these groups will "vary from market area to market area." See *Croson*, 57 U.S.L.W. at 4142.

<sup>19</sup> The Court has not yet found it necessary specifically to address appropriate criteria for determining membership in a preferred minority group or class. Indisputably, millions of Americans, not generally thought by their fellows to be minorities, carry some percentage of minority blood and genes. When the preference for minority status is as economically valuable as here, is it not inevitable that some who can make a case for membership in a minority group will assert such claims despite relative affluence or good fortune? (In India, false claims of "untouchable" status, which can give access to jobs and university places, are apparently a serious problem. See Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 572 n.84 (1975)). It simply cannot be that administrative and judicial determinations of minority status can or would turn on genealogical inquiries. Besides the horrifying historical associations that would accompany such proceedings, see, e.g., Justice Stevens' citation in his dissent of the Reichs Citizenship Law of November 14, 1935, defining Jews, *Fullilove*, 448

determinative in deciding who is entitled to a minority preference. There must be some opportunity to exclude those individuals for whom affirmative action is merely another business opportunity. For that reason, in my view, the FCC has failed sufficiently to target the preference to those actually entitled to a remedy.

Unlike the plan in *Fullilove*, it does not appear that Congress or the FCC chose adoption of a racial preference only after consideration and rejection of race-neutral means to increase minority ownership of broadcast stations. See *Croson*, 57 U.S.L.W. at 4142; *Fullilove*, 448 U.S. 463-67 (Congress carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside); *id.* at 511 (Powell, J., concurring). After identifying lack of information and lack of financing as the principal entry barriers working against people outside the "old-boy network," see dissent at 6-7, the FCC did not consider race-neutral measures to increase dissemination of information about stations up for sale or to provide financing for prospective purchasers. Instead, the FCC opted immediately for racial preferences, both in the granting of tax-deferred certificates and in the authorization of distress sales. 1978 Policy Statement, 68 F.C.C.2d at 982-84. The agency's conduct, therefore, is contrary to the direction of the Court in *Croson* and *Fullilove* that racial classifications may be employed only as a last resort.<sup>20</sup>

U.S. at 534 n.5, there are no appropriate objective criteria that could be applied. Furthermore, it seems rather flimsy to claim that a wealthy, well-educated, sophisticated individual, undeniably a member of a minority group, may constitutionally be preferred in the government's distribution of broadcast licenses solely on account of his or her ancestry. Therefore, when the government grants preferences to individuals on the basis of "minority status," determinations of that status, it seems to me, must depend on some notion of individual disadvantage, if not discrimination.

<sup>20</sup> The race-neutral measures to which the dissent refers—equal employment opportunity rules and ascertainment poli-

I also believe that the distress sale policy requires innocent third parties to shoulder an excessive burden. The important question in the case of a remedial racial preference appears to be how directly and harshly a disadvantage falls on a nonminority. See *Wygant*, 476 U.S. at 282-83 (opinion of Powell, J.); *Fullilove*, 448 U.S. at 484. In *Fullilove*, for instance, the Court found the "actual 'burden' shouldered by nonminority firms is relatively light." *Id.*; see also *id.* at 521 (Marshall, J., concurring). This was so because the public construction funds at issue constituted only two and one-half percent of all funds spent on contracting each year in the United States. The ten percent set-aside reserved for minorities amounted to only one-fourth of one percent of all construction contracting opportunities. *Id.* at 484 n.72. Similarly, in *Wygant*, the plurality opinion struck down a race-conscious layoff provision, in large part because "layoffs impose the entire burden of achieving racial equality on particular individuals." 476 U.S. at 283. The employees in *Wygant* had developed a web of associations that would have made involuntary separation particularly painful even if other jobs were readily available. The uniqueness of the existing job made its potential deprivation an unconstitutional burden.

The distress sale policy imposes an unconstitutional burden on Shurberg because it deprives him of a unique opportunity to own a broadcasting station, solely because of his race. Unlike the construction-industry plaintiffs in *Fullilove*, whose prospective opportunities in the private sector greatly mitigated the theoretical hardship on any

cies—were not designed to deal with the most significant barriers to minority ownership—lack of information and financing. Compare dissent at 28-29 with *id.* at 7. I thus disagree with the dissent's conclusion that race-neutral methods to address these entry barriers have been found wanting. See *id.* at 30.

hypothetical individual contractor, no equivalent to a distress sale is available to Shurberg.<sup>21</sup> Although there are five other television stations in the Hartford area, this is by no means a situation in which Shurberg has merely lost one of six comparable opportunities. If the distress sale policy had not been invoked and Faith Center had lost its license, Shurberg could have competed for Channel 18 in a comparative hearing. Because the incumbent licensee, Faith Center, had allegedly violated numerous FCC rules, Shurberg's chances of being awarded (free of charge) the Channel 18 license were much greater than they would have been in the typical comparative renewal evaluation where the FCC awards the incumbent an "enhancement" based on the strength of the renewal expectancy. See *Central Florida Enterprises v. FCC*, 683 F.2d 503, 506-07 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983).<sup>22</sup> Shurberg's only alternatives would be to purchase a station in the open market, assuming one is available, or hope that a new station is licensed in Hartford—something the Commission has indicated no inten-

<sup>21</sup> A nonminority may be eligible to buy a station at a distress sale price only if the revocation hearing involves bankruptcy or disability. If, as in this case, those particular issues are not implicated, only minority-controlled enterprises are eligible as buyers if the licensee elects to pursue a distress sale. The state of the record makes it difficult for me even to guess at the extent to which nonminorities are excluded, except to say that it is potentially limitless and completely within the control of the FCC. It is, after all, the FCC's exercise of discretion that determines which and how many licenses are designated for revocation hearing, which and how many renewal applications are designated for noncomparative hearing, and which issues are to be heard.

<sup>22</sup> The incumbent also has the considerable advantage of being a known quantity, ordinarily one with a record of proven performance, while the challenger usually has to rely on projections and promises. See *Central Florida Enterprises*, 683 F.2d at 507.

tion of doing.<sup>23</sup> To label, as does the dissent, Shurberg's lost opportunity for a license as a mere potential "wind-fall" is to belittle the hardship that he suffers in losing that unique opportunity solely because of his race.

The dissent argues that the policy is narrowly tailored because only thirty-three stations were transferred to minorities through this technique since 1978. Dissent at 36. That is, as the dissent observes, a small percentage of the total broadcast licenses held in the United States, although I do not know what percentage of recent license transfers this number represents. But, in any event, this is not a facial challenge as in *Fullilove*, and these statistics are of little consequence to Shurberg; the burden on him is not lessened because only thirty-three other stations have been transferred by this technique. There is no reason to conclude that he shares a community of interest with other nonminority station owners spread throughout the country that might cushion his adverse treatment. It is a Hartford station Shurberg wants and, after all is said and done, he has been absolutely denied an opportunity to compete for one merely because of his race. A chance to compete for a license elsewhere in the country is not an equivalent opportunity for Shurberg. As an applicant for a license outside of Hartford, he would be at a material disadvantage because of the competitive enhancement the FCC accords applicants with ties to the local community. See *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 606 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985).

<sup>23</sup> It is also suggested, dissent at 39-40, that if Shurberg had conveyed management and control of his company to a qualified minority and retained only a financial interest then that new organization would have been permitted to bid for the station. For that matter he could also have invested in CBS stock or moved to New York and sought a broadcast license there. I fail to see how any of these possible alternatives affect his constitutional claim.

Shurberg's situation is also analogous to the nonminority employees in *Wygant*. Like the layoff provision in *Wygant*, the operation of the distress sale policy places a direct burden on a small group of individuals: those seeking to enter the broadcast industry in a particular market. The dissent, drawing on *Wygant*, contends that Shurberg's posture is to be compared to a potential new hire, rather than an employee faced with layoff, because Shurberg seeks entry into the Hartford broadcast market. Dissent at 38. As noted above, however, the operative distinction cannot be whether one is faced with the loss of a new economic opportunity or loss of an existing one but rather how directly the disadvantage falls on the nonminority. The constitutional distinction between a tolerable and intolerable burden on the innocent turns on the uniqueness and value of the opportunity lost. An existing job has unique characteristics not normally associated with new employment opportunities. But if a nonminority were disqualified from the *only* job currently available in a given community solely because of his or her race, I believe *Wygant's* reasoning would apply. See *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922, 936 (9th Cir. 1987) (whether a wide-ranging set-aside provision spreads its burden sufficiently depends on each industry's characteristics; if government procurement is important and there are only a few nonminority firms, the burden may be crippling). I conclude that under the standards set forth in *Fullilove* and *Wygant*, the distress sale policy imposes an unfair burden on innocent nonminorities and specifically on petitioner.

### C.

The FCC also justifies the distress sale policy as a means of promoting programming diversity.<sup>24</sup> As I have

<sup>24</sup> In addition, the FCC seeks to rationalize its minority distress sale policy with the distinct goal of promoting diversity of ownership without regard to diversity of programming. In its policy statements, the FCC has contended that

noted, Justice Powell has recognized that a state interest in the promotion of diversity in an educational setting may be sufficiently compelling to support the use of race-conscious measures in furthering that interest. See *Bakke*, 438 U.S. at 311-15 (opinion of Powell, J.). Bringing together students from different cultural backgrounds promotes "[t]he atmosphere of 'speculation, experiment and creation' . . . so essential to the quality of higher education." *Bakke*, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). In *Bakke*, the state's interest in promoting diversity was strengthened by the First Amendment interests of the school in structuring its educational environment as it sees fit. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Id.* The policy decisions of a school are accordingly entitled to special deference, especially when the school seeks to "achieve a goal that is of paramount importance in the fulfillment of its mission." *Id.* at 313.

At the outset, I recognize that racial or ethnic diversity has been formally identified as a compelling government interest by only one Justice of the Supreme Court in *Bakke*.<sup>25</sup> It is not at all clear, therefore, whether a ma-

diversity of ownership is a goal that in and of itself justifies racial preferences. 1978 Policy Statement, 68 F.C.C.2d at 981. Economic diversity of ownership may well be part of the "public interest" that the Commission is authorized to promote. I do not doubt that the Commission may limit multiple ownership so as to diversify control of the public airwaves. But a desire to prevent concentration of ownership cannot justify diversification along racial lines. By itself, racial diversity of ownership is conceptually no different from racial balance in the workplace.

<sup>25</sup> Justice O'Connor did make reference to the diversity rationale in her concurring opinion in *Wygant*, 476 U.S. at 286, but her opinion for the Court in *Croson* suggests that she

majority of the Court would concur in that judgment, even in the narrow context of higher education. Indeed, in *Croson*, a plurality of the Court stated that classifications based on race should be "strictly reserved for remedial settings." *Croson*, 57 U.S.L.W. at 4139; *see also id.* at 4146 (Scalia, J., concurring); *cf. id.* at 4144 & n.1 (Stevens, J., concurring in part) (objecting to Court's "premise . . . that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong" and stating that "[u]nlike the Court" he would not prohibit race-based decisions for other purposes, such as promotion of diversity.). In light of that, I doubt that the FCC may employ a racial preference in order to promote diverse programming.<sup>26</sup> But even were a majority of the Court to embrace Justice Powell's reasoning in *Bakke*, that holding could not sustain the distress sale policy.

In *Bakke*, Justice Powell saw diversity in institutions of higher education as a compelling state interest that

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would not consider promotion of racial diversity a sufficient justification for a racial set-aside. *See Croson*, 57 U.S.L.W. at 4139. Justice Stevens does appear to have endorsed Justice Powell's discussion in *Bakke*. *See Croson* 57 U.S.L.W. at 4144 n.1 (Stevens, J., concurring).

<sup>26</sup> Even under Justice Stevens' broader view of acceptable governmental interests, I doubt whether the FCC's policy is legitimate. The melting pot notion, which Justice Stevens expressed in *Wygant* and reiterated in *Croson*, suggests that "one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land." *Wygant*, 476 U.S. at 313-15 (Stevens, J., dissenting) (quoted in *Croson*, 57 U.S.L.W. at 4144 n.2 (Stevens, J., concurring)). Unlike the state's goal in *Bakke*, which arguably served to *break down* racial and ethnic stereotypes, the FCC's policy does not reinforce the "melting pot" because television viewers never have any knowledge of the race or ethnicity of the various station owners.

justified racial preferences. It is vital to the educational mission, he concluded, that all students have "'wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 313. Crucial to his analysis was the fact that diversity benefited not just the preferred group, but *all* students and eventually the entire nation. Essentially, Justice Powell felt that the state has a compelling interest in requiring students to be exposed to a wide variety of people during their higher education.

We considered the suggested analogy between diversity of student bodies in institutions of higher education and diversity of broadcast programming in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 614-15 (D.C. Cir. 1984). At that time, we concluded that "the FCC's goal of bringing minority perspectives to the nation's listening audiences would reflect a substantial government interest . . . that could legitimize the use of race as a factor in evaluating permit applications." *Id.* at 614. For the time being, therefore, our precedent compels the conclusion that there is a compelling government interest in increasing diversity of programming.<sup>27</sup>

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<sup>27</sup> Were I free to reach the question anew, I would find the analogy wanting. It is simply unacceptable, in my view, to say that the government has a role in educating the general public through television broadcasts that is parallel to its interest in promoting diversity in the educational setting. That is a somewhat Orwellian notion. Through public education, the government has assumed a special function in preparing our youth for participation in society. Justice Powell reasoned that because "[t]he atmosphere of 'speculation, experiment and creation' is 'so essential to the quality of higher education,' a university has a compelling interest in ensuring that students are exposed to a diverse group of peers during their formative years. 438 U.S. at 312. But there is no indication that Justice Powell contemplated that his reasoning would extend beyond the distinctive context of education where the state legitimately engages in a form of indoctrination. In-

Whatever the legal validity of the FCC policy at issue in *West Michigan*, that precedent cannot support the Commission's desire to promote diversity through the distress sale policy, because the FCC itself has determined that there no longer is an inadequate diversity of viewpoints in television programming. The FCC recently determined that the fairness doctrine, aimed at promoting balanced broadcast presentations on matters of public interest, was violative of the First Amendment and inimical to the public interest. Obviously, the FCC cannot claim a compelling interest in fostering diversity of programming if such diversity already exists. Yet in disavowing the fairness doctrine, the FCC acknowledged the growth of media outlets that provide information to the citizenry, and abandoned the scarcity rationale as a justification for regulating the broadcast media more stringently than the printed press. *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C. Rcd. 5043, 5054-55 (1987), *aff'd sub nom. Syracuse Peace Council v. FCC*, No. 87-1516 (D.C. Cir. Feb. 10, 1989). Similarly, in its brief to this court sitting *en banc* in the *Steele* case, the FCC stated that "[w]ith changes in the broadcast industry over the last decade, the basis for the [race and gender] preference scheme becomes even more remote and the justification even less persuasive."<sup>28</sup> If other media are sub-

deed, Justice Powell indicated that the state's interest in fostering diversity is stronger when students are younger:

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial.

*Id.* at 313 (emphasis added).

<sup>28</sup> The FCC did not entirely repudiate this position in its *Winter Park* brief, but it came close by defending its preference scheme in a comparative license procedure as a constitutionally sound method of "achieving the compelling government interest—diversity of programming." The FCC also praised its policy implicated in *Winter Park* as a "structural

stitutes for broadcasting for purposes of presenting diverse viewpoints on controversial issues of public importance, thereby rendering the fairness doctrine violative of the First Amendment in the view of the FCC, it seems implausible that the FCC at the same time can have a compelling interest in continuing to promote diverse programming through the distress sale policy.<sup>29</sup>

But, assuming that *West Michigan* survives both *Croson* and the renunciation of the fairness doctrine, and is binding precedent on this point—that the FCC has a compelling interest in seeking racial or ethnic programming diversity when distributing broadcasting licenses—I am still faced with the issue whether a preference for minority ownership (or management) is an appropriate (narrowly tailored) means with which to achieve such programming diversity. The minority distress sale policy does not award a preference for diverse programming. Instead, the policy seeks to promote diversity of programming indirectly by limiting minority distress sale opportunities to broadcasting entities "with a significant minority ownership interest." 1978 Policy Statement, 68 F.C.C.2d at 983. As a means to promote diverse programming, the distress sale policy rests on the questionable

method[]" designed to "avoid[] government intrusion into regulation of program content."

<sup>29</sup> I do not reach the question of whether the broadcast media continue to possess unique qualities sufficient to justify content regulation. I note the FCC's inconsistency on the need for content regulation only because it undermines the "compelling need" of the agency's diversity-based rationale for the distress sale policy. The dissent argues that the 1987 continuing resolution, which prohibited the FCC from reconsidering the distress sale policy, takes precedence over the FCC's decision to discontinue the fairness doctrine and renders the FCC's inconsistency unimportant. The continuing resolution, however, can hardly be characterized as a "congressional determination that the public need for diversity in programming still warrants affirmative protection." Dissent at 22 n.25. Congress made no factual findings whatsoever concerning the existence or nonexistence of diverse programming in 1987.

premise that minority ownership will by itself lead to minority programming (or programming that might be thought to have a minority perspective).<sup>30</sup> In its brief to us in the *Steele* case, however, the FCC conceded "no record has been established on which to base an assumption that a nexus exists between an owner's race or gender and program diversity."<sup>31</sup> If one of the advantages of racial diversity is to dispel invidious racial generalizations, see *Wygant*, 476 U.S. at 316 (Stevens, J., dissenting), it seems passing strange that a policy purporting to promote diversity should itself rest on a racial generalization. Presumably, a wide variety of factors determine a broadcaster's programming proclivities. It seems impossible to say in the abstract that a person's race or ethnic ancestry has a greater effect on his tastes than his profession, religion, or education.

My dissenting colleague insists that our decision in *West Michigan* controls this issue as well, but I find that contention unpersuasive. The Supreme Court's subsequent decisions in *Wygant* and *Croson* undermine *West Michigan*'s determination of a nexus between ownership and programming, and we are thus not bound by *West Michigan* on that issue. See *Dellums v. NRC*, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988).

The dissent maintains that it is "entirely foreseeable" that minority broadcasters "will have distinct perspectives to convey." Dissent at 23. That statement more-or-less reflects the analysis of *West Michigan*, which held that the FCC may rely on a "[r]easonable expectation" that minority owners are likely to increase diversity of content. *West Michigan*, 735 F.2d at 610 (reaffirming

<sup>30</sup> The dissent terms the distress sale policy "thoughtfully conceived and monitored," dissent at 1, yet there is no evidence that once a sale was concluded the FCC made even the slightest effort to monitor the new station's contribution to minority programming.

<sup>31</sup> Once again, I am obliged to point out the FCC's brief in *Winter Park* offers only scanty evidence in support of the existence of such a nexus.

*TV 9, Inc. v. FCC*, 495 F.2d 929, 937-38 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974)).<sup>32</sup> I take that reasoning to be an assertion of common sense rather than an empirically supported proposition; as such it is simply another way of expressing racial or ethnic stereotypes. That kind of "sense," it seems to me, is all too common and has been explicitly disavowed by the Supreme Court. In *Wygant*, the Jackson Board of Education sought to justify a racial preference in teacher layoffs by citing the need to provide minority role models for its minority students. The Court rejected the Board's justification and refused to subscribe to the theory that "black students are better off with black teachers." 476 U.S. at 276. This kind of stereotyping, the plurality remarked, "could lead to the very system the Court rejected in *Brown v. Board of Education*." *Id.*; see also *Bakke*, 438 U.S. at 310-11 (opinion of Powell, J.) (rejecting proposition that minority doctors are more likely than nonminority doctors to be interested in the medical problems of disadvantaged minorities).

<sup>32</sup> Ironically, the FCC itself formerly took the position that minority preferences should be granted only after the minority applicant demonstrated a nexus to program diversity, but it was ordered by this court to assume that minority ownership would foster program diversity. *TV 9, Inc. v. FCC*, 495 F.2d 929, 937-38 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974); *Garrett v. FCC*, 513 F.2d 1056, 1062-63 (D.C. Cir. 1975); see Notice of Inquiry, MM No. 86-484, 52 Fed. Reg. at 596 (1987). Our decision in *TV 9*, which did not involve a constitutional question and was rendered before any of the Supreme Court's affirmative action decisions, offered no support for such a nexus. Its only authority for the proposition that ownership influences content was a citation to commentary which conceded that "the proposition does not lend itself to empirical analysis," and, in any event, only addressed whether diversity would be enhanced by increasing the number of owners (thereby minimizing concentration of ownership) not whether the race of an owner somehow affected programming content. *TV 9*, 495 F.2d at 938 n.31; see Note, *Media and the First Amendment in a Free Society*, 60 Geo. L. J. 871, 896, 1006 (1972).

The Court in *Croson* reiterated the impermissibility of stereotyping. Justice Stevens remarked that "the Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause." *Croson*, 57 U.S.L.W. at 4144-45 (Stevens, J., concurring). In my view, that is exactly what this court in *West Michigan* (and subsequently the FCC) has done by relying on a "reasonable expectation," without any supportive findings, that every minority owner will produce minority programming. As the Supreme Court aptly put it, "[a]bsent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics." *Id.* at 4143. And certainly, a desire to avoid the bureaucratic effort required to consider whether individual license applicants will increase diversity of programming cannot justify a racial generalization. *Id.*

If we simply assume that individual minority members have a comparative advantage in devising programs that appeal to their own racial or ethnic group, we would be obliged to accept the dangerous corollary assumption that members of the white majority have the opposite comparative advantage. But we have encountered and rejected that assumption in *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 510 (D.C. Cir. 1988). There, we remanded and directed the FCC to hold a hearing, *inter alia*, to determine whether a station owner's excuse for his sharply-reduced black employment—that blacks were not interested in or suitable for a new country and western music format—was supportable.

In any event, it is not at all apparent why a station owner, be she minority or nonminority, would make programming decisions according to her personal tastes rather than in response to the demands of the marketplace. In its *Steele* brief, for example, the FCC explained that it has determined in a series of rulemaking proceed-

ings that market forces are the primary creators of diverse programming.<sup>33</sup>

It is also argued that Congress made findings that support the nexus between program diversity and minority ownership when it approved a lottery system for the selection of broadcast licenses. See H.R. REP. NO. 765, 97th Cong., 2d Sess. (1982). Although the holding of *Fullilove* is that Congress may act to remedy past discrimination based upon less particularized historical evidence than would be required of another governmental body or a court of law, it is not clear whether the same authority exists outside the remedial context. Whatever its authority, the House conference report regarding the lottery system is not instructive as to the existence of a nexus between program diversity and minority ownership. Significantly, the report does not purport to make historical findings of fact, as did Congress in enacting the set-aside plan at issue in *Fullilove*. Rather, the statements concerning the existence of a nexus between ownership and programming are in the nature of *predictions* as to future behavior. Nowhere in the House report is

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<sup>33</sup> The dissent complains that Congress is "between a rock and a hard place," dissent at 27, because, on the one hand, it cannot under the First Amendment directly ensure a certain kind of programming or viewpoint diversity, and, on the other hand, the distress sale policy violates the Fifth Amendment because there is no evidence that the policy *will* ensure diverse programming. The rock and the hard place hardly seem so ominous, however, when one realizes that they are actually two constitutional provisions. It may simply be that diversity of programming is not a sufficient basis to justify this racial preference, because ensuring diverse content of radio broadcasts is not a permissible goal under the First Amendment, much less a compelling governmental interest under the Fifth. The apparent implication of Chief Judge Wald's reasoning is that Congress and the FCC may *indirectly* do what the First Amendment prevents them from doing *directly* in order to justify a plan that would otherwise violate the Fifth Amendment.

there evidence presented of a nexus between program diversity and minority ownership, nor is there reference to evidence upon which the committee drew. There are simply assertions that the former will follow from the latter. *See, e.g., id.* at 40 ("The nexus between diversity of media ownership and diversity of programming services has been repeatedly recognized by both the Commission and the courts.");<sup>34</sup> *see also* dissent at 26 (conceding that evidence is merely "anecdotal").

The closest thing to an actual historical finding is that "the Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H.R. REP. No. 765, 97th Cong., 2d Sess. 43 (1982). This finding of "underrepresentation" does nothing to establish the nexus between minority ownership and diverse programming. Indeed, the report goes on from there to discuss the role of minorities in the economy rather than in the programming area. *Id.* at 44.

I respectfully submit that my position—concerning the effect to be given the House conference report—is hardly "judicial presumptiveness," dissent at 14, or a "belittlement of Congress," dissent at 27 n.29, as the dissent accuses. Rather, to defer to such *ipse dixit* would be judicial abdication. If my dissenting colleague is correct, and mere congressional assertion without the sup-

<sup>34</sup> As noted above, *see supra* note 32, the FCC originally insisted on a case-by-case determination as to whether a minority owner would enhance programming diversity, but was ordered by this court, without supporting evidence, to assume that nexus. *See TV 9, Inc. v. FCC*, 495 F.2d 929, 937-38 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974); *Garrett v. FCC*, 513 F.2d 1056, 1062-63 (D.C. Cir. 1975). In an unfortunate parody of reasoning, Congress apparently relied on the *TV 9* decision, and its progeny in the FCC and this court, to document the disputed nexus.

port of any material developed in congressional hearings is adequate to justify a system of distribution of broadcast licenses based on race, then the Supreme Court's language in *Fullilove* focusing on the evidence of discrimination in government contracting that was brought before Congress was just empty rhetoric.<sup>35</sup> Congress, under that view, can instead command that government agencies award benefits or privileges to American citizens based on simple racial stereotypes. I do not believe that is sound constitutional law.

In my view, therefore, the FCC's attempt to justify the distress sale policy through analogy to the diversity goal recognized as compelling by Justice Powell in *Bakke* is inadequate. However, even assuming the dissent's view that the FCC has cleared all the hurdles I have described, the distress sale policy clearly fails the *Bakke* test for narrow tailoring.

In *Bakke*, Justice Powell condemned the use of a racial preference designed to promote diversity when race was the *only* factor considered in certain admissions decisions:

The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin

<sup>35</sup> The dissent mistakenly suggests that I have adopted the approach of Justice Stevens' dissenting opinion in *Fullilove*. Dissent at 13 & n.15. My concern is not that "judicial review should include a consideration of the procedural character of the decisionmaking process." *Fullilove*, 448 U.S. at 551 (Stevens, J., dissenting). That contention has been properly rejected by this court. *National Treasury Employees Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984). The problem with Congress' "findings" on the nexus between diversity of ownership and diversity of programming is not that they were made without adequate deliberation but that Congress did not have before it the kind of "direct evidence" that provided an "abundant historical basis" for the set-aside plan in *Fullilove*. 448 U.S. at 478 (opinion of Burger, C.J.). Indeed, Congress did not even purport to rely on any evidence.

is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.

*Bakke*, 438 U.S. at 315 (footnote omitted).<sup>36</sup> Justice Powell distinguished more flexible programs for promoting academic diversity. In particular, he pointed to the Harvard admissions policy, which considered race as one factor in a multi-factor decision, as one that promoted ethnic diversity without disregarding individual rights. Such a program would survive constitutional scrutiny because it would operate in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id.* at 317. Whatever we might think of the constitutional distinction between a racial quota and a racial "plus-factor," Justice Powell found the difference crucial, and we must look to his opinion—the only one to find promotion of "diversity" a compelling state interest—for guidance.

The distress sale policy shares the same flaw as the special admissions quota struck down in *Bakke*. Instead of considering the broad range of factors that would lead a prospective station owner to contribute to diverse programming, the policy singles out one aspect of diversity and elevates it to determinative status. Shurberg was "foreclosed from all consideration for [the Hartford station] simply because he was not the right color or had the wrong surname." *Bakke*, 438 U.S. at 318 (opinion of Powell, J.). In a particular market, diversity of programming might be best promoted by factors other than a broadcaster's race or ancestry, but the policy makes no

<sup>36</sup> For a telling analytical parallel, see Comment, *FCC Minority Distress Sale Policy: Public Interest v. The Public's Interest*, 1981 WISC. L. REV. 365, 389 ("[B]y approving the assignee . . . solely on the basis of its minority ownership and basic qualifications, the Commission does a great disservice to its ultimate goal of increasing diversity of programming.").

provision for taking those factors into account.<sup>37</sup> The FCC does not consider whether aspects of a nonminority's application other than his race suggest that he would add diversity to existing programming. Nor does it examine a minority applicant to determine whether a sale to him or her would indeed lead to an increase in diverse programming.<sup>38</sup>

#### D.

What is truly extraordinary about this case is that after the FCC (the creator of the distress sale policy) admitted that it had not adequately established a nexus between minority status and broadcast diversity to withstand constitutional scrutiny and this court, in light of

<sup>37</sup> This is in contrast to the manner in which minority status is taken into account in comparative licensing hearings. As noted, *supra* at 11 n.6, I offer no opinion on the constitutionality of minority preference schemes in comparative licensing procedures such as those at issue in *Winter Park*, which are called into question by recent Supreme Court cases. But even in *West Michigan*, we upheld the constitutionality of the FCC's comparative evaluation process largely because "it explicitly provides for examination of a wide variety of traits to assess an applicant's potential for increasing diversity and quality of programming." 735 F.2d at 615. Race is also only a partial determinant in the random selection alternative provided for by Congress in the 1982 amendments to the Communications Act of 1934. See 47 U.S.C. § 309(i) (1982).

<sup>38</sup> When discussing the distress sale policy's effect on non-minorities, the dissent states that "no pre-determined number of stations is reserved exclusively for minority ownership." Dissent at 32. However, a specific, albeit random, group of licenses are set aside: all those placed in designated-for-hearing status. Analytically, there is little difference between a specific number being set aside and a specific group being set aside for minority-use only insofar as the set-aside has an impact on nonminorities. In either case, nonminorities are absolutely barred from bidding on some predetermined number of licenses. Whether that number is calculated by percentage or by fortuity—all those stations which are designated for hearing—is of no moment.

that admission, ordered a remand to enable the FCC to reconsider the issue, Congress intervened with a continuing resolution to prevent the FCC from expending funds to pursue that inquiry in accordance with our remand order. The conference report accompanying the resolution said "[t]he Committee also instructs the Commission to resolve within 60 days all proceedings that have been remanded by the court of appeals, including . . . *Shurberg Broadcasting of Hartford, Inc. v. Federal Communications Commission*, No. 84-1600 (D.C. Cir. ordered remanded June 25, 1987)." S. REP. NO. 182, 100th Cong., 1st Sess. 77 (1987). Not surprisingly, the FCC complied with congressional direction rather than our remand order, closed the docket in which the *Shurberg* case was considered, and, in accordance with the continuing resolution, reinstated its prior distress sale policy.<sup>30</sup>

<sup>30</sup> The congressional action is especially troubling because it prevented the FCC from complying with a direct order of this court to resolve the issues described in its Notice of Inquiry concerning the justification for the distress sale policy. The continuing resolution commanded that no funds shall be used "to continue a reexamination of" the distress sale policy, and the Senate Appropriations Committee explicitly directed the FCC "to resolve within 60 days all proceedings that have been remanded by the court of appeals . . . , including *Shurberg*, . . . in a manner consistent with the policies that mandated incentives for minorities and women in broadcast ownership." S. REP. NO. 182, 100th Cong., 1st Sess. 77 (1987). By its action, not only has Congress prevented the FCC from attempting to muster factual support for a position that it conceded was impermissible on the present record, but it has placed the FCC in a situation where it was obligated to disregard an order of this Court. Congress' action thus carries serious constitutional implications, because there is little difference between stripping a court of jurisdiction and stripping the Executive Branch or an independent agency of authority to comply with orders of the court. Cf. *United States v. Klein*, 80 U.S. 128, 145 (1872) (Congress exceeds power under exceptions clause when "language of the [statute] shows plainly that it does not intend to withhold jurisdiction except as means to an end."); *Ex Parte McCordle*, 74 U.S. 506 (1869).

My dissenting colleague draws on the continuing resolution to support the claim that there is a nexus between diversity of ownership and diversity of programming. I fail to see, though, how congressional statements made in 1987 can be relevant to the question whether the distress sale policy was constitutional as applied to *Shurberg* in 1984. Congress cannot, after the fact, change a law that had effect three years earlier.<sup>40</sup> Moreover, the terse 1987 report of the Senate Appropriations Committee would add little foundation for the distress sale policy even if it were relevant, because it consists merely of an assertion that "[d]iversity of ownership results in diversity of programming and improved service to minority and women audiences." S. REP. NO. 182, 100th Cong., 1st Sess. 76 (1987). The 1987 report itself relies primarily on the House conference report from 1982, see opinion of MacKinnon, J., at 12-14, which fails to establish the required nexus for reasons discussed earlier. See *supra* at 43-45.

\* \* \*

In sum, the FCC has a policy in search of a justification. While the Commission claims to be principally pursuing diversity of programming, it uses racial stereotypes as a proxy for such diversity, and alternatively relies for support on congressional authority to remedy the effects of past racial discrimination. The dissent purports to rely exclusively on the diversity rationale, but seeks to strengthen the FCC's position with references to remedial goals and authority. Whichever purposes actually motivated the FCC, the policy cannot withstand equal protection scrutiny.

<sup>40</sup> It is the impossibility of retroactive effect that renders the continuing resolution irrelevant to this litigation. Congress might be able to dictate a new rule for *prospective* application to a pending dispute. See *Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519 (D.C. Cir. 1984). In saying that I "dismiss[] the entire episode," dissent at 25, my colleague apparently overlooks the distinction between prospective and retroactive effect.

It is doubtful that the FCC has a compelling interest in fostering programming diversity, and even if it does, the agency has failed to show that there exists a nexus between minority ownership and diversity of program content. Nonminorities interested in particular licenses are completely excluded by the operation of the policy, and it therefore fails the requirement of narrow tailoring enunciated in *Bakke*.

The remedial rationale fares no better. The historical basis for the plan is only general findings of underrepresentation, which might not even be a result of "societal discrimination" as used by the Court in *Croson*. If "remedial," as used in *Croson*, carries the soft imprecise meaning that Chief Judge Wald suggests, *see* dissent at 41 n.48, there really is no constitutional barrier to Congress legislating racial and ethnic proportional representation for beneficiaries of government programs or federal employees. In any event, the distress sale policy is not narrowly tailored to remedy past discrimination, because its effect is unrelated to the need for such a remedy, and it provides no procedures for ensuring that the policy's beneficiaries have actually suffered from the effects of past discrimination. There is no indication, moreover, that the FCC sought to employ race-neutral programs to aid minorities before resorting to a racial set-aside. Finally, the distress sale policy imposes a heavy burden on innocent minorities by completely depriving them of opportunities to compete for unique television outlets.

Shurberg challenged the constitutionality of the distress sale policy only as a last resort in this proceeding and only after years of seeking an opportunity to compete openly and fairly for a television license in Hartford. We too have sought, procedurally and analytically, to avoid deciding this important constitutional question. I think, however, that I have no alternative now but to conclude that the FCC's distress sale policy as applied to Shurberg is unconstitutional.

MACKINNON, *Senior Circuit Judge* (concurring in judgment): Alan Shurberg and Shurberg Broadcasting Company of Hartford, Inc. (Shurberg) petition for review of the decision of the Federal Communications Commission (FCC or Commission) permitting Faith Center, under the Commission's minority distress sale program,<sup>1</sup>

<sup>1</sup> The FCC's distress sale policy to promote Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, as expanded and reaffirmed in 1982 provides:

The distress sale policy allows broadcasting licensees whose licenses have been designated for revocation hearing, prior to the commencement of a hearing, to sell their station to a minority-owned or controlled entity, at a price "substantially" below its fair market value. A licensee whose license has been designated for hearing would ordinarily be prohibited from selling, assigning or otherwise disposing of its interest, until the issues have been resolved in the licensee's favor. Thus, extension of the tax certificate and distress sale policies fosters minority ownership by providing broadcast licensees with an incentive to transfer their interests to minority-owned or controlled entities. *Id.*, at 851.

*In the Matter of Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 861. The stated objective was to increase diversity programming to serve First Amendment principles and to reflect minorities' tastes and viewpoints. *Id.* at 850. The Commission also reported:

Since 1978, we have approved 27 distress sales and 55 tax certificates,\* which have contributed significantly to in-

\* Tax certificates authorized by 26 U.S.C. § 1071 permit sellers of broadcast properties to defer capital gains taxation on a sale whenever the sale was "necessary or appropriate to effectuate a change in a policy or the adoption of a new policy by the Commission with respect to the ownership and control of radio broadcasting stations . . ." The policy arose originally in connection with divestitures imposed by the Commission's multiple ownership rules.

to sell its Hartford broadcast properties to Astroline Communications Company Limited Partnership (Astroline), a minority (Hispanic) controlled enterprise. Shurberg challenges the FCC decision on several grounds. His constitutional challenge alleging that the sale to Astroline under the distress sale program violates equal protection as guaranteed by the Fifth Amendment<sup>2</sup> warrants a reversal of the Commission's decision on the ground that it does not satisfy the "narrowly tailored" requirement of equal protection analysis.

### I. FACTS

Prior to 1977 Faith Center, Inc. (Faith Center) held licenses in various cities to operate three television stations and one FM station. However, Faith Center solicited funds that were not used for the purpose described in its broadcasts which resulted in the revocation of all its licenses except WHCT-TV in Hartford, Connecticut whose license had been designated for revocation hearing. The first two attempts by Faith Center to make distress sales of WHCT-TV failed due to the minority purchasers' inability to obtain financing. After these two failed attempts, Shurberg attempted to have an open comparative hearing but his petition was denied by the

creased minority ownership in broadcasting. . . . [The amendment of the] distress sale policy marks a departure from our long established practice of prohibiting a licensee in a renewal or revocation hearing from disposing of its interests prior to the resolution of issues in its favor.

*Id.* at 852, 858.

The 1978 policy statement requiring the distress sale price to be substantially below its fair market values was expanded in 1980 to limit the licensee's recovery to not more than 75% of the station's fair market value. *Lee Broadcasting Corp.*, 76 F.C.C.2d 462 (1980).

<sup>2</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954).

FCC. Subsequently, the Hartford station and license were transferred to Astroline in a non-competitive proceeding pursuant to the Commission's distress sale policy which promotes minority participation in the ownership of broadcast properties.<sup>3</sup> The transaction was consummated on January 23, 1985. Thereafter the case came before this court for review on a Petition by Shurberg and eventually, in response to the request of the Commission, the *record*, not the "case," was remanded to the FCC. With the case in that status at the end of the 1987 term of Congress, the following rider was attached to Congress' Continuing Resolution, approved December 22, 1987:

That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue to reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 27 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended 52 R.R.2d 1313 (1982) [sic<sup>4</sup>] and *Mid-Florida Television Corp.*, 60 F.C.C.2d 607 Rev. Bd. (1978) [sic<sup>4</sup>], which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applica-

<sup>3</sup> See n.1. Since its adoption in 1978, 38 distress sales have been approved by the Commission and the overall effort of fostering minority ownership has been moderately successful. See *Distress Sales Approved*, copies available from FCC Consumer Assistance and Small Business Division, Office of Public Affairs (updated October 18, 1988). Astroline states that the number of minority controlled stations acquired by all means has nearly doubled from less than one (1) percent in 1977 to now close to two (2) percent of all broadcast properties licensed by the Commission. (Astroline Brief, p. 5, n.3).

tions, or proceedings, which were suspended pending the conclusion of the inquiry . . . .

On February 9, 1988 the FCC issued an Order in *Faith Center, Inc.* BC Docket No. 80-730 which included the following:

In compliance with this litigation [set forth above], the Commission has ordered MM Docket No. 86-484 closed, thereby terminating the reexamination of its licensing policies based on racial, ethnic or gender preferences. Order, FCC 88-17, adopted January 14, 1988. In order to comply with the legislation fully, the Commission also ordered that its licensing policies based on racial, ethnic or gender preferences that were in effect prior to September 12, 1986, be reinstated and that the presiding Administrative Law Judges, the Review Board, and the Office of the General Counsel process all licensing cases in a manner consistent with Commission policy in effect prior to September 12, 1986. *Id.*<sup>4</sup>

The FCC then denied Shurberg's application for a comparative hearing and Shurberg now seeks review by this court of the Commission's Order. Shurberg complains of being denied a comparative hearing, alleges that *ex parte* contacts tainted the validity of the proceedings, and attacks the Commission's application of its minority distress sale policy to him. However, the case has leveled down to a constitutional attack on the distress sale policy.

## II. CONSTITUTIONAL ANALYSIS

As others have noted,<sup>5</sup> the Supreme Court opinions on the constitutionality of minority preference programs are unclear and disjointed. The four principal cases—*Regents*

<sup>4</sup> The congressional ban on reexamination of the FCC's distress sale policy was reenacted in 1988. 134 Cong. Rec. S-10,004 (Daily ed. July 7, 1988).

<sup>5</sup> See, Silberman, at 16. Dissent at 1.

of the *University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 57 U.S.L.W. 4132 (Jan. 23, 1989) (citations to Slip Opinion) have spawned a multitude of separate and diverse opinions. Only portions of Justice O'Connor's *Croson* opinion commanded a majority of the Court.<sup>6</sup> Consequently, my colleagues have drawn differential conclusions from those wide ranging opinions. The task, therefore, is

<sup>6</sup> *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), is not strictly applicable to the constitutional analysis that is required here. *Johnson* is a Title VII case which expressly recognized that Title VII analysis differs from constitutional analysis. 480 U.S. at 627-8 n.6. However, applying *Johnson*'s Title VII requirements, which are analogous to constitutional analysis required here, the FCC's minority distress sale program is flawed. In *Johnson*, the Transportation Agency implemented an affirmative action program in which the sex of a job applicant could only be taken as one factor in an employment decision, and the Court relied heavily on the fact that, under the program, sex or race was considered as a mere plus factor in the evaluation process:

[T]he Plan merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants. . . . [T]he Agency Plan requires women to compete with all other qualified applicants. No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants.

*Johnson*, 480 U.S. at 638 (emphasis in original).

The FCC's minority distress sale program works precisely to the opposite end since it takes a broadcast license completely out of the normal competitive licensing process and all non-minority individuals, Shurberg included, are automatically excluded from competing. The minority's status here is not merely a small plus factor. Rather, it is the determinative factor that deprives all nonminorities of any opportunity to compete. Thus, the virtues Justice Brennan found in the narrowly tailored Transportation Agency Plan point out the vices in the untailored FCC minority distress sale program.

to fashion an opinion based on the soundest reasoning in the minority preference cases. In my opinion, generally following Justice Powell's reasoning in the first three principal cases<sup>7</sup> and the *Croson* majority is the superior approach to solving the troublesome issues presented by minority preference programs.

Some broad settled principles can be sifted from the Court's decisions on minority preference programs. First, "benign" racial or ancestral distinctions are given the same standard of review as invidious classifications. *Croson* at 18 (O'Connor, J.), 1 (Scalia, J.). *Wygant*, 476 U.S. at 273; *Fullilove*, 448 U.S. at 491 (Burger, C.J.); *Bakke*, 438 U.S. at 291-299 (Powell, J.).<sup>8</sup> That standard is strict scrutiny. *Croson* at 18 (O'Connor, J.), 1 (Scalia, J.). Such examination has two phases: 1) "The racial classification 'must be justified by a compelling government interest.'" *Wygant*, 476 U.S. at 224 quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Croson* at 17 (O'Connor, J.). 2) The government program used to achieve its objective must be "narrowly tailored." *Croson* at 31; *Fullilove*, 448 U.S. at 480; *Wygant* at 274. A narrowly tailored preference program must have two characteristics.<sup>9</sup> First, the program must bear some

<sup>7</sup> Choper, Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle, 72 Iowa L. Rev. 255 (Jan. 1987).

<sup>8</sup> As stated in *Croson*: "[T]he mere recitation of a 'benign' or legitimate purpose for a racial classification, is entitled to little or no weight." *Croson* at 24. (Citing *Weinberger v. Wiesenfeld*, 420 U.S., at 648, n.16 which, as here, involved the due process clause of the Fifth Amendment.). Thus, there is no difference, in this respect, between pronouncements of "benign" purpose by Congress or state legislatures.

<sup>9</sup> The Supreme Court has not explicitly held that a race conscious program aimed at promoting diversity must be structured to minimize the burden on innocent nonminorities. It is quite difficult, however, to conclude that the Court would not impose such requirement where the constitutional right to

relationship to the compelling state interest it seeks to vindicate. *Fullilove*, 448 U.S. at 514-15 (Powell, J.).<sup>10</sup> Second, the program must operate to minimize its burden on innocent nonminorities. *Wygant*, 476 U.S. at 282-84; *Fullilove*, 448 U.S. at 515 (Powell, J.).

The two contentions asserted in support of the constitutionality of the Commission's distress sale policy are that it remedies past societal discrimination and promotes programming diversity. Dissent op. 11, 41.<sup>11</sup> Because

equal protection is involved. The best explanation for the Court's failure to so act is that Justice Powell's opinion in *Bakke* is the only prior consideration given to the issue as to whether promoting diversity is a justification for a race conscious program. Consequently, the Court has not had the occasion to develop or apply the narrowly tailored doctrine explicitly to promoting diversity. Because the minority distress sale policy imposes the same injury on innocent nonminorities regardless of whether the justification asserted for the affirmative action program is to promote diversity or to remedy past discrimination, it is logical that the no undue burden test would apply with equal force in both cases.

<sup>10</sup> The dissent in n.46 recognizes "that Faith Center's misconduct was unrelated to racial discrimination. [And then asserts] [S]urely this can make no difference." But it does. It points out that this award does not even remedy one instance of racial discrimination. While it is not required that the "resources themselves must be the product of past discrimination," if they had been, the minority distress sale program would have remedied some identifiable past discrimination, but not even that justification exists here. The minority distress sale program presents opportunities that are not dependent on any past discrimination—societal or specific. Therefore, the program bears no relationship to the asserted governmental interest in remedying past discrimination as required by *Fullilove*. 448 U.S. at 514-515 (Powell, J.).

<sup>11</sup> The question of whether promoting programming diversity and remedying societal discrimination constitute compelling government interests need not be reached here. In *City of Richmond v. Croson Co.*, *supra*, Justice O'Connor's plurality opinion held open the possibility that Congress, pursuant to its power under Section 5 of the 14th Amendment, may legis-

the Commission's distress sale program is not narrowly tailored to achieve either of its required objectives, the program, in my opinion, fails to meet constitutional requirements.

late race-conscious programs on grounds which the several states may not. *Croson* at 15. Justice Kennedy's concurrence, however, pointedly challenged Justice O'Connor's assertion that Congress may legislate to remedy societal discrimination and noted that such a case "is not before us, any reconsideration of that issue must await some further case." *Croson*, at 1 (Kennedy, J.).

On the issue of promoting programming diversity, the dissent and Judge Silberman have some disagreement. In *Bakke*, Justice Powell held that promotion of diversity in the school/university context constituted a compelling state interest. 438 U.S. at 311-313 (Powell, J.). Outside of past governmental discrimination, the Court has not recognized any other governmental interest as compelling. Yet, as the dissent observes, Justice O'Connor's *Wygant* opinion explicitly holds open the possibility that "lower courts" could rely on other interests sufficiently compelling "to sustain the use of affirmative action policies." *Wygant*, 476 U.S. at 286 (O'Connor, J.). The dissent contends that this Circuit's holding in *West Michigan Broadcasting v. FCC*, 735 F.2d 601, 614-15 (D.C. Cir. 1984), recognized the promotion of programming diversity as an interest sufficiently compelling to "sustain the use of affirmative action policies" and this court is bound by *West Michigan*. Dissent at 16. Judge Silberman reluctantly accepts the holding in *West Michigan* that programming diversity constitutes a compelling state interest. He considers such contention to be "a somewhat Orwellian notion." Silberman, J. at 37, n.26. In this context, it is significant to note that Justice O'Connor's *Croson* plurality opinion indicates that racial classifications should be "strictly reserved for remedial settings" in order to avoid fueling racial animosities. *Croson* at 18 (O'Connor, J.). This case does not involve a "remedial setting."

Because the minority distress sale program is not narrowly tailored, it is not necessary in this opinion to reach the question whether either promoting programming diversity or remedying societal discrimination are a sufficiently compelling governmental interest to support the use of government sponsored minority preference programs.

### A. The Untailored Effect

The distress sale program is not only not "narrowly tailored," it is a completely untailored program. That is, the program is open-ended in that circumstances may cause it to be applied to any broadcast licensee without regard to any past discrimination and thereby deprive all nonminorities of their right to equal access to a broadcast license. The FCC program thus denies the equal protection of the law to innocent nonminorities.

The licenses of thirty-eight stations have been subjected to the minority distress sale program.<sup>12</sup> While the number of stations is not great, the value of the stations involved run well into the millions. For instance the license renewals of RKO's highly valuable TV stations in Boston, New York and Los Angeles were denied,<sup>13</sup> (not on grounds of discrimination), and they could have been transferred under the minority distress sale program, the FCC consenting. Had the program been in effect in 1971, the *Greater Boston* station could also have been brought under the distress sale program.<sup>14</sup> Rupert Murdoch's television station in Boston might also have been brought under the distress sale policy as a result of the well publicized legislative intervention in the application of the FCC's change of policy with cross-ownership rules. See, *News America Publishers, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988). Thus, in judging whether the program is narrowly tailored consideration should be given not only to the number of stations that

<sup>12</sup> See *Distress Sales Approved*, copies available from FCC Consumer Assistance and Small Business Division, Office of Public Affairs (updated October 18, 1988).

<sup>13</sup> See *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981) (license renewal denied for corporate misconduct).

<sup>14</sup> *Greater Boston Television Corporation v. FCC*, 463 F.2d 268 (D.C. Cir. 1971) (license renewal denied for improper *ex parte* contacts).

have been affected but also to the value and share of the broadcast market of the stations that could be brought under the program with a resulting large subsidy.<sup>15</sup> The minority distress sale program presents opportunities for minorities to be insulated from all competition and to receive very substantial subsidies that are not in any way related to past discrimination. The number of licenses which become available for distress sales under the minority program is wholly fortuitous, being dependent upon decisions by third party licensees whose practices run afoul of FCC requirements.<sup>16</sup>

This case presents a good example of a license becoming subject to the minority distress sales program independent of any past discrimination. Here, Faith Center was alleged to have fraudulently solicited funds by not using the funds for the stated purpose in violation of 18 U.S.C. § 1343. 82 F.C.C.2d 1 (1980), *reconsid. denied*, F.C.C. 81-235 (1981), *aff'd mem.*, *Faith Center Inc. v. FCC*, 679 F.2d 261 (1982), *cert. denied*, 459 U.S. 1203

<sup>15</sup> The dissent contends that objecting to the minority distress sale program on the grounds that there is no limit to the number of licenses the program may reach is "perverse" in light of the relatively few distress sales over the previous ten years. Dissent at 36 n.41. This attack misses the thrust of the argument; the lack of numerical limits on the program is but one aspect of the untailored nature of the minority distress sale policy. In addition to the lack of any numerical limit on the program, there is no limitation whatsoever as to the value, size or market share of affected stations, or the need for prior discrimination by the licensee. In this way, the program is untailored in any respect and completely obliterates the constitutional rights of all nonminorities seeking a license. It never places minority status as merely one plus factor for the Commission to weigh in licensing as *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), did in employment. Rather minority status is elevated to the determinative factor.

<sup>16</sup> All distress sales of broadcast licenses must be approved by the FCC.

(1983). There is no connection between Faith Center's violation and any past discrimination that is in any way related to the number of licenses which may become available to minorities under the distress sale program. Although, in practice, only a small number of licenses have been transferred pursuant to the policy, there is no actual limitation, in theory or in practice, on the number of licenses that may be so transferred. Nor is there any requirement that the offense of the licensee be in any way related to any act of unlawful discrimination. The distress sale program bears no relationship to any alleged past discrimination and, therefore, violates the *Croson* majority position that:

[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.

*Croson* at 29, quoting *Fullilove, supra*, at 533-535 (Stevens, J., dissenting) (footnotes omitted).<sup>17</sup>

Likewise, because the distress sale program has no limits of any character it is not sufficiently tailored to the goal of promoting programming diversity. Compliance is voluntary and the program contains no assurance that any programming diversity will be achieved.<sup>18</sup> Thus,

<sup>17</sup> The classification of American Eskimos, Aleuts and Hispanic surnamed individuals as minorities who have been discriminated against in the broadcast licensing field cannot be said to be unquestionably legitimate. "The gross overinclusiveness of Richmond's [the FCC's] racial preference strongly impugns the . . . claim of remedial motivation." *Croson* at 31. See *infra*, n.26.

<sup>18</sup> The dissent states that the small number of distress sales are insufficient to provide empirical data as to whether proper programming diversity is achieved. Dissent at 26-27. In my view, the small number of distress sales provides a perfect group for such study.

the FCC, subject only to the broad public interest standard, has unfettered discretion in approving distress sales.

The Silberman opinion also contends that the distress sale program, as a means of promoting diversity, is not a means that is reasonably related to its goal. Specifically, this argument is that there has been no demonstration of a nexus between minority ownership and programming diversity. In reasoning to its conclusion, this contention discounts Congress' decision expressed in the 1987 appropriations rider<sup>19</sup> to prohibit the Commission from expending funds to investigate whether a nexus exists between programming diversity and minority ownership. The Committee Report stated Congress so acted because it found that there was such a nexus. S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987).<sup>20</sup> The Silberman opinion doubts whether "mere congressional assertions" may be taken to embody a congressional finding to which courts must defer. Silberman at 41. I have no such doubt. Congress is not required to write legal opinions to justify its legislation. Chief Justice Burger stated in *Fullilove*: "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove* at 478. See, Dissent at 13.

In stating that the 1987 Senate Committee Report was merely assertive, the Silberman opinion is certainly correct. However, the Report also made reference to H.R.

<sup>19</sup> *Supra*, p. 2-3.

<sup>20</sup> The Report of the Appropriations Committee states:

The Congress has expressed its support for (minority preference) policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987).

Rep. No. 765, 97th Cong., 2d Sess., 40 (1982), which clearly, and at some length, detailed the support for the legislative conclusion that there was a nexus between minority ownership and programming diversity. H.R. Rep. at 42.<sup>21</sup> The 1987 Senate Report incorporated the

<sup>21</sup> The Report of the Senate Appropriations Committee cites H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 37-44, 1982, as authority for its assertion that Congress in the past supported minority preference programs for the broadcasting industry. S. Rep. No. 182, 100th Cong., 1st Sess. 76-77 (1987). The cited House Conference Report (1982) is replete with statements outlining its finding that minority preference programs in broadcast licensing promotes diversity in programming. For example, the Report states: "The nexus between diversity of media ownership and diversity of programming services has been repeatedly recognized by both the Commission and the courts." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. at 40 (1982). My personal view, which is identical to that asserted by the FCC brief in *Steele v. FCC*, No. 84-1176, discussed below, is that, while undoubtedly there may be some exceptions, market forces largely predominate programming—but the congressional finding controls.

Judge Silberman relies on the FCC's brief in *Steele* as support for his assertion that there is no nexus between minority ownership and programming diversity. Silberman op., at 42-43. The FCC *Steele* brief states:

No record has ever been developed to support the critical, underlying assumption upon which this preference scheme is necessarily based—that the racial or gender characteristics of a station's [sic] owner will have a significant effect on a station's programming. FCC *Steele* brief at 22.

The brief concluded that "market forces are now and will continue to be, principally responsible for providing diversity of programming and viewpoint." *Id.* at 22-23. The congressional finding, however, eclipses the FCC's argument in *Steele* and the FCC's brief in *Winter Park Communications v. FCC*, Nos. 85-1755 and 85-1765, appears to repudiate its *Steele* brief. In *Winter Park*, the Commission states that its minority preference policy on the competitive licensing process promotes diversity as minority ownership enhances "the

1982 Report by reference. Given such incorporation, it is difficult to dispute the assertion that Congress found there was a nexus between minority ownership and programming diversity. Such finding, however, does not completely insulate a minority preference program from judicial review.<sup>22</sup> And, as previously stated, that review must be conducted with strict scrutiny.<sup>23</sup> *Crosby* at 18 (O'Connor, J.), 1 (Scalia, J.).

### B. Undue Burden on Nonminorities

As a remedy of past discrimination and a means to promote diversity, the minority distress sale program unduly burdens innocent nonminorities. It operates so as to necessarily impact on a discrete class of nonminorities—i.e., every nonminority applicant for a broadcast license in a particular market that is designated for revocation hearing. The effect of this FCC program is particularly damaging because it removes the opportunity to obtain a license in a competitive market that is unlikely to be repeated.<sup>24</sup> Normally, a broadcast license is retained by an incumbent licensee if he so desires; thus, a broadcast license designated for revocation hearing that is unlikely to be renewed presents a rare opportunity for individuals

public's exposure to significant, diverse groups that make up the nation." FCC *Winter Park* brief at 30.

<sup>22</sup> *Fullilove* at 473. Chief Justice Burger, speaking in a minority preference case, remarked: A congressional program choice or finding does not "render it (the program) immune from judicial scrutiny."

<sup>23</sup> TAN 5.

<sup>24</sup> The dissent "acknowledge[s]" at p. 32 that the minority distress sale program acts to "reserve certain opportunities to minority purchasers alone" and thus, "more closely resembles" the university admissions plan struck down in *Bakke*, rather than a "plus factor" scheme the Court has approved of in other contexts. See, *Bakke*, 425 U.S. at 316-319; *Johnson v. Transportation Agency*, 480 U.S. 616, 637-639 (1987) (under Title VII analysis).

such as Allen Shurberg to attempt to obtain a license in a particular market.<sup>25</sup> The distress sale program takes this opportunity away from every individual who is not classified as a minority as defined by the FCC.<sup>26</sup>

The dissent asserts that since Shurberg did not have a vested ownership interest in the station, he lacked a reasonable expectation of acquiring any license and hence cannot succeed in a constitutional attack on the policy. Dissent at 37-39. This is peculiar reasoning. In my view the fact that he is a valid applicant denied a hearing to his damage permits him to successfully attack the unconstitutional character of the denial. The dissent analogizes the distress sale program to an affirmative action hiring plan as opposed to a firing plan. Justice Powell's *Wygant* opinion expressed a preference for remedying employment discrimination through hiring plans because they diffused the burden of a race conscious program throughout society instead of disrupting the expectations of a small group with an established interest. 476 U.S. at 282.

The dissent's analysis is unpersuasive. While the minority preference plan does not neatly fit into Justice

<sup>25</sup> Since the FCC implemented the minority distress sale program in 1978, eleven applications for license or license renewals were denied by the Commission. As of Fiscal Year 1987, the FCC licensed 11,493 broadcast stations, 9,847 of which were commercial stations. See, Federal Communications Commission 53rd Annual Report/Fiscal Year 1987, p. 21, 36-37. Additionally, the FCC Report notes that there are 1,489 translator and booster FM stations, and 5,568 translator and low power television stations which are subject to minority preference programs. *Id.* at 20-21.

<sup>26</sup> The FCC's 1978 Statement of Policy on Minority Ownership of Broadcasting Facilities defines the groups recognized as having minority status for purposes of the distress sale program as follows: "Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American Ex- traction." 68 F.C.C.2d at 781, n.8 (1978).

Powell's dichotomy of hiring and firing plans outlined in *Wygant*, the program operates more like a firing plan in that it imposes its burden squarely on a small group of innocent people, like Shurberg, denying them a unique and tangible benefit—the opportunity to compete for a broadcast license that would normally under applicable decisions, the statute and rules be open to a comparative hearing. Communications Act of 1934, 47 U.S.C. § 309 (e), amended; *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945).<sup>27</sup> Thus, the distress sale program completely foreclosed Shurberg from his best and perhaps only genuine prospect of obtaining an ownership interest in Hartford. In this way, the FCC always concentrates the burden of its minority preference program on a single individual or small group in a community that desires a broadcast license and are able to finance the acquisition without being subsidized.

The dissent also argues that the distress sale program does not unduly burden nonminorities because it affects only a fractional percentage of broadcast licenses. Dissent at 40. This argument is a nonstarter because regardless of the impact of the program on the entire market, the burden of hopefully correcting some discrimination and achieving some diversity in programming falls largely on Shurberg in this case and will necessarily exclude *every* nonminority individual in *every* distress sale. These burdened individuals are entitled to the equal protection guaranteed by the Fifth Amendment even though constitutional violations by the program have not

<sup>27</sup> Section 309(e) provides, in part, that upon the Commission finding that a licensee has violated FCC rules, shall: "[F]ormally designate the application [of the licensee] for hearing on the ground or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action. . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate."

yet reached substantial proportions. *Supra*, n.2.<sup>28</sup> The rights of every man are violated when the rights of one are diminished.<sup>29</sup>

### CONCLUSION

The FCC minority distress sale program thus deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment. The program is not narrowly tailored to remedy past discrimination or to promote programming diversity because it unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interest it seeks to vindicate.

For the foregoing reasons I join in the judgement of the court, that the minority distress sale program denies Shurberg equal protection under the due process clause of the Fifth Amendment.

<sup>28</sup> The stakes to the parties involved are certainly substantial. If Shurberg eventually prevails, he will be awarded a license for a station appraised at \$6,520,000; if the FCC prevails, Astroline will preserve a \$3,420,000 subsidy and Faith Center will salvage \$3,100,000 from its lost license.

<sup>29</sup> President John F. Kennedy.

WALD, *Chief Judge*, dissenting: Congress, governmental agencies, and federal courts have struggled for nearly two decades to define the constitutional limits on affirmative efforts to improve access of minority groups to the mainstream of American life. This case involves a unique type of governmental access program not heretofore passed on by the Supreme Court. The majority's invalidation of the Commission's ten-year old minority distress sale program in my view impermissibly overturns a considered congressional judgment as to the appropriate means of assuring diversity of viewpoint over the national airwaves. In casting off a thoughtfully conceived and monitored program aimed at attaining a legitimate congressionally mandated end, the majority has too rigidly applied Supreme Court affirmative action guidelines designed for other types of programs, ignored firm precedents in this circuit, and failed to credit the explicit intent of Congress.

#### I. THE CONSTITUTIONAL STATUS OF GOVERNMENT-SPONSORED MINORITY PREFERENCE PROGRAMS

The United States Supreme Court has issued four decisions concerning the constitutional limitations on voluntary government-sponsored affirmative action programs. See *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989).<sup>1</sup> A majority of the Court has squarely held that the remediation of prior racial discrimination is a sufficiently compelling interest to justify the use of racial preferences. Justice Powell's opinion in *Bakke* also recognized as compelling the state's interest

<sup>1</sup> See also *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (court-ordered plan directed at employment discrimination); *United States v. Paradise*, 480 U.S. 149 (1987) (same).

in promoting diversity within the context of higher education.

Within this circuit, moreover, a third interest has been recognized as sufficiently compelling to justify the use of racial preferences. In *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), this Court upheld the use of race in comparative licensing procedures as part of the Commission's effort "to obtain a diverse mix of broadcasters." 735 F.2d at 613. That decision, of course, is binding precedent except insofar as it is called into question by subsequent decisions of the Supreme Court.<sup>2</sup> In my view, the identification of broadcasting diversity as a compelling government interest is entirely consonant with Supreme Court precedent. The Court has never limited the diversity rationale to the makeup of student bodies. Nor has it held that there exist only two governmental interests sufficiently compelling to justify race-conscious affirmative action. Indeed, Justice Powell's landmark opinion in *Bakke* itself notes three separate state interests in a public university medical school that, if supported by an adequate record, could be considered "compelling": the elimination of identified discrimination, the improvement of public health services, and the promotion of student body diversity. 438 U.S. at 307-14. Justice

<sup>2</sup> This court's decision in *West Michigan* antedated the Supreme Court's decisions in *Wygant* and *Croson*, and of course *West Michigan* is no longer binding insofar as it conflicts with the higher Court's pronouncements. I do not believe, however, that either *Wygant* or *Croson* undermines our earlier views concerning the compelling nature of the state's interest in broadcasting diversity. See *infra*, pp. 17-19.

I also recognize that the distress sale policy differs in significant respects from the use of race as one element in comparative licensing proceedings. See *infra*, pp. 31-35. Both policies, however, start from the premise that broadcast diversity is a sufficiently compelling state interest to justify the use of racial preferences.

O'Connor has also provided a perspective wider than the panel's for our review of this case:

[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently "compelling," at least in the context of higher education, to support the use of racial considerations in furthering that interest . . . And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

*Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) (citations omitted) (emphasis added).

The Supreme Court's recent decision in *Croson* imposed stringent requirements on state and local governments seeking to institute affirmative action programs for the purpose of providing increased economic opportunities for minorities. *Croson*, however, differs from the present case in two fundamental respects. First, *Croson* involved the initiative of a local governmental body, while continued enforcement of the distress sale policy has been mandated by an Act of Congress. Second, the distress sale policy was intended by Congress to enhance public access to diverse broadcast programming—a goal that is quite different from that which the Court addressed in *Croson*. We must therefore bear in mind that the limitations announced in that decision cannot be applied mechanically to the present controversy. Rather, we must carefully analyze the objective the distress sale policy serves, and the constitutional fit of the chosen means to that end, bearing in mind Congress' repeated authorization and endorsement of this program's specific method and goal.<sup>3</sup>

<sup>3</sup> Appellant argued strenuously before this court that the FCC, in this case, did not follow its own distress sale policy

## II. DEVELOPMENT OF THE DISTRESS SALE POLICY

In 1965, the FCC<sup>4</sup> publicly proclaimed its commitment to the concept of diversification in ownership and control of the media on the premise that "diversification of control is a public good in a free society." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965) [hereinafter *1965 Policy Statement*]. The Supreme Court has upheld the FCC's ownership diversification policies as consistent with the public interest standard and the first amendment goal of promoting diversity of viewpoint:

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rules and exceeded permissible limits on its discretion to apply the policy in the licensing process. Indeed, in granting Faith Center a third successive opportunity to arrange a distress sale rather than requiring a renewal hearing, the FCC acknowledged that its balancing of the public interest in minority-ownership policies against the public interest in permitting comparative hearings was a "close question." J.A. at 5, citing *New South Media Corp. v. FCC*, 685 F.2d 708 (D.C. Cir. 1982), and *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). Had the majority concluded that the FCC acted arbitrarily or exceeded its authority in authorizing the third attempt at a distress sale, it would have avoided the constitutional question altogether. Indeed, it is hard to set how anything short of a fairly compelling interest could justify such repeated postponement of *Ashbacker* comparative hearings.

I note in passing my disagreement with Judge Silberman's contention, *see* Silberman op. at 12 n.7, that I would not be entitled to address the constitutional question if I did not adopt the FCC's position on the statutory issue. Since a majority of the panel has determined that the constitutional question must be resolved, I reserve my right to express my views, whether or not I would have reached the issue if the choice were mine alone to make.

<sup>4</sup> In the Communications Act of 1934 Congress empowered the FCC to allocate broadcast licenses in such a way as to serve the "public convenience, interest, or necessity." 47 U.S.C. § 307(a).

It was not inconsistent with [the Communications Act of 1934,] therefore, for the Commission to conclude that the maximum benefit to the "public interest" would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole.

. . . "The 'public interest' standard necessarily invites reference to first amendment principles" . . . and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources."

*FCC v. National Citizens Committee for Broadcasting [NCCB]*, 436 U.S. 775, 795 (1978) (citations omitted).

The Commission found achievement of its goal of viewpoint diversity through ownership diversity hampered by the dearth of minority broadcasters. As a result of the "exhaustively documented" underrepresentation in the ownership of mass media broadcast facilities, *West Michigan*, 735 F.2d at 603 n.5, the FCC expanded its diversification policy to encompass a positive effort at attaining minority representation in broadcasting:

Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

*Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978) [hereinafter *1978 Policy Statement*].<sup>5</sup> The FCC concluded that "[a]dequate representation of minority viewpoints in programming . . . enhances the diversified programming which is

<sup>5</sup> The FCC also reiterated its earlier concern that "diversification . . . is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." *1978 Policy Statement, supra*, at 981 (quoting *1965 Policy Statement, supra*, at 394).

a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Id.*

In implementing its policy of diversity of viewpoint through diversity of ownership, the FCC designed the distress sale program as part of a broader strategy for dealing with the "extreme disparity between the representation of minorities in our population and in the broadcasting industry." *1978 Policy Statement* at 982.<sup>6</sup> It added the distress sale policy only after other approaches to increasing minority representation in programming, such as equal employment opportunity rules and ascertainment policies, had not achieved significant results. *Id.*

Administrative law judges had previously been instructed to award a competitive preference to minority license applicants in comparative hearings if the minority owners would actively participate in running the station. Several pending license applications involving a significant minority ownership interest had been expedited. Minority underrepresentation persisted, however, and the FCC's Minority Ownership Taskforce, after careful study, identified the cause in several structural impediments to minority access to broadcasting facilities.

The Minority Ownership Taskforce concluded that the most significant barriers to minority ownership were lack of knowledge of stations up for sale, attributable largely to an "old-boy network" monopoly on such information, and the unavailability of adequate financing for potential minority owners. See *Minority Ownership Taskforce Report, supra*, at 9, 11. Lack of broadcasting

<sup>6</sup> The FCC had previously noted that "[d]espite the fact that minorities constitute approximately 20 percent of the population, they control fewer than one percent of the 8500 commercial radio and television stations currently operating in this country." FCC Minority Ownership Taskforce, *Minority Ownership in Broadcasting* 1 (1978) [hereinafter *Minority Ownership Taskforce Report*] (emphasis in original).

experience among potential minority applicants, an inevitable concomitant of persistent underrepresentation in the industry, also blocked their access. As long as these formidable impediments to entry existed, the Taskforce felt that the market would not self-correct so as to afford adequate opportunities for minority ownership.

Responding to the Taskforce Report, the FCC decided that it must deal directly with the identified entry barriers—lack of information and financing. It announced policies to grant capital gains tax deferral certificates to those selling to minority firms<sup>7</sup> and to authorize distress sales to qualified minority purchasers. The FCC designed the distress sale policy to create an incentive for minority-controlled entities to enter the broadcasting field.<sup>8</sup> Pur-

<sup>7</sup> The FCC has the authority under § 1071 of the Internal Revenue Code to grant sellers tax certificates to defer capital gains taxation on the transaction. These certificates may be used as incentives to induce sales of broadcast properties to minority owners. See 26 U.S.C. § 1071; *Issuance of Tax Certificates*, 19 Rad. Reg. 2d (P&F) 1831 (1970).

<sup>8</sup> The distress sale policy is essentially an administrative exception to the general rule that once a licensee's basic qualifications have been called into question by designation for either a revocation or a renewal hearing, the licensee may not voluntarily transfer the license. There have, however, always been exceptions to this rule for bankrupt or disabled licensees. The minority distress sale policy expanded these exceptions to include licensees who would agree to sell at a discount to qualified minority-controlled purchasers.

By 1982, the FCC had approved only 27 distress sales in four years. Finding that the continued underrepresentation of minorities was still a "serious concern" and financing still posed "the single greatest obstacle" to increased minority participation, the FCC modified the distress sale policy further. After reviewing the recommendations of its Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, the Commission announced that it would authorize distress sales to limited partnerships so long as the general partner was a member of a minority group and owned more than 20% of the enterprise. The pur-

suant to the policy, the licensee designated for a revocation hearing or one whose renewal application might be in jeopardy on basic qualification issues could, instead of proceeding normally through the hearing process, elect to sell its station to a minority-controlled applicant at a "distress price."<sup>9</sup> Through the distress sale policy, a qualified minority applicant would obtain a *special* opportunity to buy a station at a reduced price.

On several occasions Congress has endorsed the FCC's efforts to diversify media control through programs to encourage minority ownership and control.<sup>10</sup> For example, amending the Communications Act in 1982 to authorize the FCC to employ lotteries in lieu of comparative license hearings, Congress specifically provided

pose of the amendment was to allow minority entrepreneurs easier access to the necessary capital. See *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 855 (1982) [hereinafter *1982 Policy Statement*].

In 1985, the FCC began consideration of a further revision of the distress sale policy to allow a licensee to exercise a distress sale option at a later stage in the renewal proceeding. See Notice of Inquiry, 50 Fed. Reg. 42,047 (1985). Nonetheless, in the past six years, the Commission has only approved 11 more distress sales, for a modest total of only 38 in ten years.

<sup>9</sup> The distress sale policy requires that the sale price reflect no more than 75% of the market value of the broadcast property and license in order to retain the deterrent effect of license revocation hearings. See *Lee Broadcasting Corp.*, 76 F.C.C.2d 462 (1980). Nonetheless, the prospect of even greater loss if a license is revoked gives the current licensee an economic incentive to sell at this discount price to a minority buyer.

<sup>10</sup> "It is the firm intent of the Conferees that traditional Commission objectives designed to promote the diversification of control of the media of mass communications be incorporated in the administration of a lottery system." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

for special media ownership and minority ownership preferences in order to encourage diverse voices on the airwaves. "The underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of programming content. This diversity principle is grounded in the First Amendment." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982). Specifically citing the FCC's 1978 *Policy Statement*, in which the FCC announced the minority distress sale policy, the Conference Committee concluded that:

[An] important factor in diversifying the media of mass communications is *promoting ownership by racial and ethnic minorities*—groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. *The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.*

*Id.* at 43 (emphasis added).

Congress again reaffirmed its strong support for the FCC's programs to foster minority ownership in 1987. In its appropriations law for 1988, Congress prohibited repeal or reconsideration of the distress sale policy and two other minority preference programs. Pub. L. No. 100-202, 101 Stat. 1329 (1987).<sup>11</sup> See also H.R. Conf. Rep. 498, 100th Cong., 1st Sess. 504 (1987). The Senate Appropriations Committee, which reported out this provision, explained:

<sup>11</sup> The congressional ban on FCC reconsideration of these programs was recently extended through fiscal year 1989. See Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988).

The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. *Diversity of ownership results in diversity of programming and improved service to minority and women audiences.*

S. Rep. 182, 100th Cong., 1st Sess. 76 (1987) (emphasis added). The discourse at the hearings with then-FCC Chairman Fowler made clear the Committee's view that "the Commission [has] a responsibility to make sure that [the airwaves] are used to reflect the diversity of views and the diversity of background and interests in our country." *Departments of Commerce, Justice, State, the Judiciary and Related Agencies Appropriations for Fiscal Year 1988: Hearings on H.R. 2768 Before a Subcommittee of the Senate Committee on Appropriations*, 100th Cong., 1st Sess. 17 (1987) (statement of Senator Lautenberg) [hereinafter 1987 Hearings].

### III. ANALYSIS

#### A. Scope of Review

Whatever its status at prior stages of this litigation, the distress sale program is today a deliberately chosen congressional policy, embodied in legislation passed by the House and Senate and signed by the President. In my view, the distress sale policy is a constitutional means of pursuing Congress' objective: ensuring greater diversity in programming. As Judge Silberman recognizes, "the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body." *Fullilove*, 448 U.S. at 515-516 n.14 (Powell, J., concurring).<sup>12</sup> See Silberman op. at 20-21. It is clear in my

<sup>12</sup> The application of *Fullilove* to this case is complicated by the fact that in *Fullilove*—as in *Bakke* and *Wygant*—no opinion commanded a majority of the Court. I rely principally on Chief Justice Burger's opinion, joined by Justices Powell and White. The Chief Justice's opinion plainly occu-

view that the distress sale policy remains in place—and this controversy remains before our court—as a direct result of legislation enacted by Congress. Although Judge Silberman suggests that this legislation need not be given the respect ordinarily owed to Acts of Congress, his position is unconvincing.<sup>13</sup>

Noting that the 1987 statute forbade the Commission to reexamine the distress sale policy, and thus precluded compliance with our previous remand order, Judge Silberman suggests that the statute impermissibly constricted the jurisdiction of the court of appeals. *See* Silberman op. at 48 n.39. The statute, however, says nothing about jurisdiction: it simply directs the agency to apply a particular rule of law to disputes before it. Congress plainly has the power to establish substantive rules to be applied in agency adjudications; moreover, Congress may insist that a new rule be applied to a pending dispute. *See*

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pied a middle ground between the position of Justices Brennan, Marshall, and Blackmun, who announced fairly deferential standards for review of affirmative action programs generally, and that of Justices Stewart, Rehnquist, and Stevens, who would have struck down the MBE program.

<sup>13</sup> I note that Judge MacKinnon accepts the premise that the distress sale program represents a considered congressional policy choice. *See* MacKinnon op. at 12-14.

The fact that Congress has acted does not, of course, mean that the distress sale policy is *ipso facto* constitutional. My colleagues are correct in asserting that even an Act of Congress is subject to searching scrutiny when constitutional values are implicated. *See* Silberman op. at 44-45; MacKinnon op. at 14. But while the congressional judgment is not dispositive, it surely makes a difference. Congress has far broader powers than does an administrative agency; its findings of fact are entitled to greater respect; and, unlike the agency, it need not compile a formal record or issue an opinion. Moreover, section 5 of the fourteenth amendment entrusts Congress with the authority to implement equal protection guarantees. These factors do not obviate the need for judicial review, but they do shape the contours of our inquiry.

*Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519 (D.C. Cir. 1984).<sup>14</sup> This principle is simply the application to administrative agencies of the more general rule that an adjudicative body “is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 711 (1974). *See also* *Thompson v. Sawyer*, 678 F.2d 257, 279 (D.C. Cir. 1982). The fact that the statute superseded this court’s remand order is of no consequence: it is clearly within the power of Congress to overrule judicial decisions, at least within the statutory sphere, and this “nullification” of judicial precedent does not constitute an infringement on the court’s jurisdiction.

Nor did the statutory change work any unjust surprise on the parties to this case. The 1987 statute did change the applicable law, since it eliminated the agency’s prior discretion to abrogate or modify the distress sale policy. The statute did not, however, require that the rights of Shurberg or Astroline be adjudicated on the basis of standards which were unforeseen at the time this dispute began. To the contrary, the law by its terms required only that the agency continue to apply its preexisting rules. It therefore seems clear to me that this is not a case in which the application of a new statute to a pending proceeding will create “manifest injustice” to the litigants.

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<sup>14</sup> Although Congress was evidently aware of Shurberg’s pending complaint, there is no suggestion that Shurberg was singled out for unfavorable treatment or that the congressional action was in any sense a vendetta against a particular individual. This case is thus plainly distinguishable from *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988), which stressed that “[t]he Hollings Amendment strikes at Murdoch with the precision of a laser beam” and that “Murdoch and News America were more than mere ‘catalysts’ for congressional action aimed at a particular evil.” *Id.* at 814, 815.

Judge Silberman also argues that Congress did not devote sufficient attention to the problem, and that the legislative history fails to reveal an adequate factual basis for the legislature's action. *Fullilove*, however, quite clearly rejected the notion that courts may inquire into the sufficiency of congressional deliberations. As Justice Stevens' dissent in that case pointed out, the set-aside provisions were mentioned in neither the House nor the Senate committee reports; on the floor of Congress "only a handful of legislators spoke and there was virtually no debate." *Fullilove*, 448 U.S. at 549-50 and n.25 (Stevens, J., dissenting).<sup>15</sup> Those Justices who voted to uphold the program did not contest Justice Stevens' assertion that congressional debate had been scanty. Chief Justice Burger's opinion noted that "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Id.* at 478. See also *id.* at 502-03 (Powell, J., concurring) ("The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. . . . After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area"); *id.* at 520 n.4 (Marshall, J., concurring in judgment). The clear thrust of *Fullilove* is that evidence of congressional deliberation (such as committee reports or lengthy floor debate) is not required. Rather, deliberativeness must be presumed so long as Congress had before it sufficient information for the formation of a considered opinion.<sup>16</sup> The distress sale

<sup>15</sup> Judge Silberman's approach, in fact, is strikingly similar to that of Justice Stevens in *Fullilove*. Since Justice Stevens' approach was accepted by no other member of the Supreme Court, we are powerless to adopt it here.

<sup>16</sup> One commentator has written that "[b]ecause [legislators] are the direct representatives of the people, the law

policy, of course, had been in place for over nine years when Congress acted to preserve it: it can hardly be doubted that Congress had access to a sufficient store of information for the rendering of a considered judgment.<sup>17</sup> Given this factual background, my colleague's refusal to regard the statute as a considered congressional choice is simply judicial presumptiveness. Moreover, it runs directly counter to circuit precedent. In *National Treasury Employees Union v. Devine*, 733 F.2d 114 (D.C. Cir. 1984), we considered an appropriations measure which provided that no federal funds could be expended for the implementation of certain Office of Personnel Management regulations. In holding the regulations to be barred, we stated:

It is true that courts must act cautiously in interpreting appropriations measures, to avoid inferring substantive effects that were never intended. However, the Supreme Court has never suggested that this principle of statutory construction should be transformed into a rigid constitutional mandate, requiring courts to make a qualitative determination whether each house has given a measure *sufficient*

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imposes no restrictions on them with respect to their use or nonuse of facts as a basis for legislating." Davis, *Facts in Lawmaking*, 80 Colum. L. Rev. 931 (1980). And Judge Silberman has cited no authority for the proposition that a court may scrutinize the decisionmaking process of Congress and invalidate laws to which "inadequate" attention has been paid.

<sup>17</sup> Moreover, Congress had acted some years previously to mandate the use of racial preferences within the FCC's lottery system. I do not contend that the lottery mechanism is constitutionally indistinguishable from the distress sale program. Both, however, depend on the same core premises: that a station's programming will be significantly affected by the race of its owner, and that the public interest in diverse programming is served by measures which increase the heterogeneity of broadcast licensees.

consideration before voting in favor of it. Such an intrusion into Congress' legislative deliberations would pose serious separation-of-powers problems, and neither the language nor logic of the Constitution compels such an inquiry.

733 F.2d at 117 n.8 (emphasis in original) (citation omitted).

Since the distress sale program was mandated by a considered congressional policy choice, I believe that the Supreme Court's recent decision in *Croson* is of limited relevance to the present dispute. Of the six Justices who comprised the *Croson* majority, four drew an express distinction between the expansive powers of Congress and the more limited powers of state and local governments. See 109 S.Ct. at 719 (Opinion of O'Connor, J.) ("That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate"); *id.* at 736 (Scalia, J., concurring) ("[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1"). That distinction was hardly a new innovation: *Fullilove* stressed the distinctions between different public institutions and emphasized that Congress may exercise remedial powers of a scope that would be denied to any other state actor. See also *Bakke*, 438 U.S. at 309 (Opinion of Powell, J.) ("isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria"); *cf. Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

## B. *The Distress Sale Policy as a Means of Increasing Diversity in Programming*

### 1. *The Compelling Nature of the State Interest*

To this point the Supreme Court has identified two governmental interests that may, under appropriate circumstances, be sufficiently compelling to justify the use of racial preferences: remedying past discrimination and enhancing diversity in higher education. Moreover, the governmental interest asserted here—the desire to ensure that television viewers have access to a diverse range of programming—seems closely analogous to the educational interest with Justice Powell found sufficient in *Bakke*.

The question presented here—whether the government's interest in educational diversity is closely analogous to its interest in preserving public access to a variety of broadcast fare—is admittedly a question on which reasonable people may differ. And it is a question to which the Supreme Court has thus far failed to provide a definitive answer. It is not, however, an open question within this circuit. This court expressly approved the analogy in *West Michigan*, stating that "[j]ust as the FCC rests its goal of attaining diverse programming on the First Amendment value 'that the widest possible dissemination of information is essential to the welfare of the public,' Justice Powell recognized that a state university could find support in the First Amendment for the goal of attaining a diverse student body. . . ." 735 F.2d at 614 (citation omitted). The law within this circuit is that broadcaster diversity, like diversity within public institutions of higher education, is a sufficiently compelling governmental interest to justify the use of racial preferences. This precedent may legitimately be disregarded only if it has been undermined by subsequent decisions of the Supreme Court.

Judge Silberman contends that *Wygant* undermines the authority of *West Michigan*, since in his view the *Wygant* Court rejected the "role model" theory offered by the Jackson Board of Education. See Silberman op. at 41. In fact, however, only four Justices in *Wygant* rejected the role model theory; Justice White's concurrence focused exclusively on the fact that the plan involved layoffs.<sup>18</sup> One of the four also cautioned that "[t]he goal of providing 'role models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty." 476 U.S. at 288 n.\* (Opinion of O'Connor, J.). The same distinction is central here. The distress sale policy rests on the assumption that viewers and listeners of every race will benefit from access to a broader range of broadcast fare, not that consumers will inevitably gravitate towards programming disseminated by licensees of their own race.

Judge Silberman also suggests that the Court in *Croson* rejected the pursuit of diversity as a permissible justification for affirmative action programs. My colleague relies heavily on the *Croson* plurality's insistence that racial preferences should be "strictly reserved for remedial settings." 109 S.Ct. at 721 (Opinion of O'Connor, J.);<sup>19</sup> see Silberman op. at 36. Of course, the underrepresentation of minorities within the broadcasting industry, and the resulting lack of diversity in programming, is the result of past racial discrimination.

<sup>18</sup> Justice White stated that "[w]hatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different matter." 476 U.S. at 295.

<sup>19</sup> The statement in *Croson* that racial classifications should be "strictly reserved for remedial settings," 109 S.Ct. at 721, represents the view of only four Justices and is therefore not a holding of the Court.

The effort to promote diversity is thus, in an important sense, an effort to remedy the effects of past discrimination. To say that diversity is the goal of the distress sale policy is simply to say that the intended beneficiary is the public (who will profit from exposure to a wider range of programming) rather than the minority broadcaster himself (who will gain increased economic opportunities). Judge Silberman's premise is that a program can be deemed "remedial" (as that term is used in *Croson*) only if its beneficiaries are themselves past victims of discrimination. Though that is not an implausible reading of Justice O'Connor's language,<sup>20</sup> I do not believe that her *Croson* opinion compels the invalidation of diversity-oriented affirmative action programs. Given Justice O'Connor's apparent approval of Justice Powell's diversity rationale in her *Wygant* concurrence, see 476 U.S. at 286, I am hesitant to conclude, based on a brief, ambiguous reference in a case involving a quite different plan, that she has now abandoned that rationale entirely.<sup>21</sup>

<sup>20</sup> I must acknowledge that Justice Stevens, like Judge Silberman, appears to read Justice O'Connor's opinion as rejecting the diversity rationale. See 109 S.Ct. at 730 & n.1 (Stevens, J., concurring).

<sup>21</sup> Under Judge Silberman's view of *Croson*, all consideration of race by public universities as an element of diversity would be rendered unconstitutional. Moreover, all nine Justices in *Bakke* agreed that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, imposes restrictions at least as stringent as those established by the Constitution. See *Bakke*, 438 U.S. at 286-87 (Opinion of Powell, J.); *id.* at 328-40 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.); *id.* at 416 (Opinion of Stevens, J.). Judge Silberman's prohibition, therefore, would perforce apply to all private universities which receive federal funds. I would hesitate, however, to infer such a sweeping change in the law governing university admissions policies based on a few ambiguous words of dicta in a plurality opinion.

Even if I read the *Croson* plurality as eliminating the diversity rationale as a permissible justification for state and local affirmative action programs, I would not conclude that the same restrictions should apply to Congress. The plurality's recognition of the broad remedial powers of Congress—in particular, its recognition that “Congress may identify and redress the effects of society-wide discrimination,” *see* 109 S.Ct. at 719—militates against any easy transference of the limitations deemed appropriate for state and local entities. Because the *Croson* Court did not directly address the permissibility of the diversity rationale, and because that case dealt with the remedial powers of a local government rather than with the authority of Congress, I do not believe that *Croson* requires the rejection of the federal interest asserted here.

Certainly the state lacks the power to exercise day-to-day control over the programming decisions of private broadcasters. But the federal supervisory power over broadcasting is nevertheless quite extensive—far greater, in fact, than its power over the construction industry. A federal agency, pursuant to the directives of Congress, has the sole authority to determine who may and who may not operate a broadcast facility. And precisely because the broadcaster will enjoy relatively unfettered freedom once his station commences operations, the government has both the right and the duty to exercise care in the initial decision to award a license. I think it is settled law that in choosing licensees the state may seek to further “the First Amendment goal of achieving ‘the widest possible dissemination of information from diverse and antagonistic sources.’” *FCC v. National Citizens Committee for Broadcasting* (NCCB), 436 U.S. 775, 795 (1978) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). *See also FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984) (“Congress may . . . seek to assure that the public re-

ceives through this medium a balanced presentation on issues of public importance that otherwise might not be addressed”); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Certainly the Constitution places limits on the methods which Congress may use to enhance diversity within the broadcasting media. But the legitimacy of the government's interest is undeniable.

Of course, to say that Congress has a legitimate interest in enhancing broadcast diversity does not mean, *ipso facto*, that the state's interest is sufficiently compelling to justify the use of a racial preference. And I recognize that Justice Powell's *Bakke* opinion focused on the distinctive characteristics of the academic environment. For those who are fortunate enough to attend a college or university, interaction with fellow students may be a principal means of access to information about the world.<sup>22</sup> But those who lack the background or the resources to pursue a university education may be largely dependent upon the broadcast media to expose them to influences and ideas beyond their immediate sphere of experience. The state's interest in ensuring that *all* its people have access to a wide and varied range of broadcast options seems to me to be every bit as compelling as its interest in creating a diverse student body within a public university.<sup>23</sup>

<sup>22</sup> A university is not, however, a self-contained world: University students have access to the same range of broadcast fare (and often to cable services) which is available to the public generally. If the university has a compelling interest in exposing students to diverse ideas *in addition* to those which are available to the citizenry at large, then it is hard to see how the state could have a less weighty interest in ensuring diversity for those who lack access to university facilities.

<sup>23</sup> In *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), the Court stated: “Our Nation is deeply committed to safeguarding academic freedom which is of transcendent

Even if this were an open question within the circuit, I would therefore conclude that the promotion of broadcast diversity is a compelling governmental interest, an interest closely analogous to the enhancement of diversity within the educational institutions operated by the state. For good or ill, a large portion of the American polity relies upon the broadcast media as a principal source of information about the world in which they live. Given the governmental role in selecting broadcast licensees, I believe that the state bears a responsibility to allocate franchises in such a way as to further the ability of viewers and listeners to obtain access to diverse programming. I do not suggest that broadcast licensees stand in precisely the same relation to the FCC as students or teachers stand to the administrators of a public university. I do believe that the Commission, in selecting licensees who will serve the public interest, must ultimately be responsive to concerns which are in the truest sense educational.

Judge Silberman mixes apples and oranges in claiming that the FCC's abandonment of the fairness doctrine indicates that the enhancement of diversity on the airwaves is no longer a compelling interest. See Silberman op. at 38-39. The fairness doctrine, whatever its merits, is quite distinguishable from the distress sale policy: the

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value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection,' *United States v. Associated Press*, 52 F. Supp. 362, 372." The citation to *Associated Press*—which justified antitrust regulation of the print media as a means of enhancing diversity—at least suggests that the Court saw a connection between the government's efforts to promote diversity of opinion inside and outside the classroom. Justice Powell quoted this passage from *Keyishian* in his *Bakke* opinion. See 438 U.S. at 312.

fairness doctrine involved direct control over the content of programming. The distress sale policy, by contrast, seeks to diversify programming indirectly through a limited targeting of license opportunities. The FCC did not abandon the fairness doctrine because it believed that fostering debate on controversial issues of public importance was not part of its mission, but rather because it considered the *means* involved to be content-based control of speech.<sup>24</sup> The distress sale policy raises no such concerns.<sup>25</sup>

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<sup>24</sup> In its decision to eliminate the fairness doctrine, the Commission was principally motivated by its doubts concerning the doctrine's effectiveness, not by doubts as to the legitimacy of governmental efforts to enhance broadcast diversity. The Commission stated that "under the standard of review set forth in *Red Lion*, a governmental regulation such as the fairness doctrine is constitutional if it furthers the paramount interest of the public in receiving diverse and antagonistic sources of information. Under *Red Lion*, however, the constitutionality of the fairness doctrine becomes questionable if the chilling effect resulting from the doctrine thwarts its intended purpose." *Syracuse Peace Council*, 2 F.C.C. Rcd. 5043, 5052 (1987) (emphasis added).

In denying reconsideration of its order abrogating the fairness doctrine, the Commission stated: "As noted in the August order, the fairness doctrine is clearly a content-based regulation of broadcast speech. Neither that order nor this reconsideration calls into question the constitutionality of our content-neutral, structural regulations designed to promote diversity." *Syracuse Peace Council (Reconsideration)*, 3 FCC Rcd. 2035, 2041 n.56 (1988) (citation omitted).

<sup>25</sup> My colleague's reliance on the FCC's abrogation of the fairness doctrine also ignores the fact that Congress has acted in this case. The statutory requirement that the distress sale policy be continued reflects a congressional determination that the public need for diversity in programming still warrants affirmative protection. If there were in fact a contradiction between discontinuation of the fairness doctrine and the decision to maintain the distress sale policy, this court would plainly be required to give precedence to the congressional judgment.

I cannot accept my colleague's denigration of the state interest involved here. In my opinion the government clearly has a compelling interest, sufficient to justify the careful use of racial preferences, in encouraging the dissemination of broadcast programming which reflects the nation's diversity. This view is compelled by circuit precedent and is fully consonant with the decisions of the Supreme Court.

## 2. *The Nexus Between Ownership and Programming*

Judge Silberman is openly skeptical about the effectiveness of any FCC policy that addresses program or viewpoint diversification through broadening ownership or control of the media. Of course, there is no *guarantee* that minority ownership and management will necessarily lead to minority-oriented programming or even to the expression of a discrete minority viewpoint on the airwaves. Similarly, there is no guarantee that minority students will intermingle with nonminority students or exchange viewpoints in a state university, or even that the particular minority students admitted will have typical or distinct "minority" viewpoints. *Cf. Bakke*, 438 U.S. at 311-13. These are predictive judgments of a sort which simply do not lend themselves to ironclad proof. It seems to me entirely foreseeable, however, that minority broadcasters—like minority students—will have distinct perspectives to convey. And it seems equally foreseeable that these perspectives will find expression in the licensee's programming decisions.<sup>26</sup>

The ownership-programming nexus underlying the distress sale policy does not, however, rest on such assump-

<sup>26</sup> The nexus is not limited to the broadcasting context, but has been documented in other communications industries as well. *See, e.g., Media and the First Amendment in a Free Society*, 60 Geo. L.J. 867, 896 (1972) (stating that ownership is the key variable affecting news content and editorial policy of a newspaper).

tions alone, but on two decades of congressional, judicial and agency findings. Back in 1968, the Kerner Commission announced:

The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slightings and indignities are part of the Negro's daily life, and many of them come from what he now calls the "white press"—a press that repeatedly, if unconsciously reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform and educate the whole of our society.

*Report of the National Advisory Commission on Civil Disorders* 203 (1968). Nine years later, the United States Commission on Civil Rights endorsed the Kerner Commission's view "that a mass medium dominated by whites will ultimately fail in its attempts to communicate with an audience that includes blacks."<sup>27</sup>

Several decisions of this court have also been premised on the reasonable belief that encouraging minority ownership can be expected to promote diversity of programming. *See, e.g., West Michigan, supra; Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975); *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972). Indeed, we have held that "it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news." *TV 9*, 495 F.2d at 938. I believe that these principles remain valid today.

<sup>27</sup> United States Commission on Civil Rights, *Window Dressing on the Set: Women and Minorities in Television 2* (1977).

Congress' conclusions about the nexus between minority ownership and programming diversity, however, are the most significant, for, as the Supreme Court has instructed us, the showing necessary to support an affirmative action program depends in part on the competence of the governmental unit making the finding. As early as 1982, Congress recognized the minority-ownership/diversity nexus, which is the basis for the distress sale policy. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982) ("[t]he nexus . . . has been repeatedly recognized"). In authorizing a lottery system for choosing among qualified broadcast license applicants, Congress directed the FCC to implement a minority-ownership preference, so that "this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public." *Id.* at 43.

In 1987, Congress spoke even more clearly, directly addressing the distress sale policy itself. The FCC had proposed to Congress a "one-time study designed to elicit empirical evidence to determine whether there is a nexus between minority/female ownership and viewpoint diversity as required by the Constitution. . . ." 1987 *Hearings, supra*, at 77 (statement of Commissioner Fowler). Congress' response was that further study was unwarranted; the tie between minority ownership and programming diversity was sufficiently strong to support the constitutionality of the distress sale policy. "The committee believes the inquiry is unwarranted. . . . Diversity of ownership results in diversity of programming." S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). The Act itself said that "none of the funds appropriated . . . shall be used . . . to continue a reexamination" of the distress sale policy. Pub. L. No. 100-202, 101 Stat. 1329, 1331 (1987). Judge Silberman fails to give this congressional judgment its due. He dismisses the entire episode with the cryptic note that the

FCC ended its reconsideration "without issuing any conclusions," claiming that the aborted inquiry casts doubt on the causal link between increased minority ownership and programming diversity. Silberman *op. at* 10. He fails to see the forest: Congress terminated the inquiry because it firmly concluded for itself that the connection was there and no need for Commission reconsideration existed.<sup>28</sup>

The evidence supporting these findings has typically been anecdotal rather than statistical. *Cf. 1985 Fairness Report*, 102 F.C.C.2d 143 (1985) (FCC's belief that the fairness doctrine chilled speech is justified by reference to anecdotal rather than statistical evidence). In part this is because the subject does not lend itself to quanti-

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<sup>28</sup> Clearly Congress had a sufficient basis for its belief that increased minority ownership of broadcasting facilities will enhance diversity of programming. In 1978, the Commission concluded "that diversification in the areas of programming and ownership—legitimate public interest objectives of this Commission—can be more fully developed through our encouragement of minority ownership of broadcast properties." 1978 *Policy Statement* at 981. Four years later, recognizing "the ever-present 'dearth of minority ownership' in the telecommunications industry to be a serious concern," it reaffirmed and expanded the distress sale policy and other minority ownership-oriented policies. *See 1982 Policy Statement* at 852. Judge Silberman relies heavily on the Commission's recent doubts concerning the existence of the nexus. *See Silberman op. at* 40 (citing FCC's *Steele* Brief). Given the existence of conflicting views within the agency, it was plainly within the competence of Congress to find that the nexus exists.

Since the original congressional ban on reexamination of the distress sale policy, the Congressional Research Service has released a report which supports the conclusion that a nexus exists between minority ownership and programming. *See Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (Congressional Research Service 1988). Senator Hollings relied on this report in successfully arguing for a reenactment of the appropriations ban. *See 134 Cong. Rec.* S10,021 (daily ed. July 27, 1988).

fication. In part, though, it is because the dearth of minority broadcasters has made it quite difficult to draw empirical conclusions concerning the programming offered by minority-owned stations. Judge Silberman's approach to the case places Congress in an impossible bind; it makes the distress sale policy's constitutionality dependent on evidence which simply will not be available until minority ownership of broadcast stations has increased substantially.

Judge Silberman fails as well to take account of the first amendment limits placed upon Congress and the FCC, which preclude more direct efforts to enhance program diversity. Although the Commission cannot control directly the variety of programming that licensees afford the public, Judge Silberman nonetheless insists that the constitutionality of this congressionally mandated policy requires demonstrable proof of the connection between ownership and programming. Congress is between a rock and a hard place: it cannot under the first amendment directly ensure a certain kind of programming or viewpoint diversity, yet the panel overturns its entirely reasonable efforts aimed at diversity for want of proof that they will definitely produce the anticipated results.<sup>29</sup>

I also do not believe that the distress sale policy is rendered invalid by the fact that participating minority broadcasters are not required to prove that they are individual victims of prior discrimination. See Silberman op. at 27-28. Three Justices in *Croson* did stress the

<sup>29</sup> Because "balancing the various First Amendment interests involved in the broadcast media . . . is a task of great delicacy and difficulty," *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 102 (1973), Judge Silberman's belittlement of Congress' clearly expressed mandate is particularly inappropriate. Under such circumstances, "we must afford great weight to the decisions of Congress and the experience of the Commission." *Id.*

desirability of such fine-tuning, see 109 S.Ct. at 718 (Opinion of O'Connor, J.), but in no case has a majority of the Court held that individualized consideration is required.<sup>30</sup> In any event, such a requirement seems inapplicable to the present case. Since the distress sale policy is intended to serve as a method of enhancing broadcast diversity—not as a means of redressing injuries done to the minority broadcasters themselves—it does not seem particularly germane whether the individual who is awarded a license can establish that he has suffered from specific discriminatory acts. Any requirement that affirmative action plans bestow their benefits only on those who are themselves victims is therefore inapplicable to Congress' justification for the distress sale policy.

In fact, the promotion of minority ownership as an approach to program diversity clearly meets the test of "narrow tailoring." The FCC has, over the years, experimented with several devices to further program diversification without directly regulating programming content. The distress sale policy was adopted only after specific findings by the FCC that equal employment opportunity rules<sup>31</sup> and ascertainment policies<sup>32</sup> alone were

<sup>30</sup> In the context of court-ordered race-conscious relief, six members of the Supreme Court agreed in *Local 28* that "preferential relief benefitting individuals who are not the actual victims of discrimination" may be required. 478 U.S. at 482.

<sup>31</sup> The Supreme Court has praised the FCC's efforts in minority employment as a way of accomplishing programming diversity. "The Federal Communications Commission has adopted regulations dealing with the employment practices of its regulatees . . . . These regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.5 (1976) (citations omitted).

<sup>32</sup> The FCC's "ascertainment" policy required licensees to contact community leaders and members of the general public,

insufficient to accomplish significant minority participation in programming.<sup>33</sup> The Commission found that the market was neither able nor willing to provide the necessary degree of diversity in programming.<sup>34</sup> I therefore

specifically including minorities and women, to obtain information about community interests so as to present programming responsive to those interests. *See Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1976). As part of a conscious dismantling of command and control regulations—actions requiring specific conduct by licensees—the FCC has more recently cut back on ascertainment requirements. *See Honig, The FCC and Its Fluctuating Commitment to Minority Ownership of Broadcast Facilities*, 27 How. L.J. 859, 867 (1984).

<sup>33</sup> In announcing the distress sale policy, the FCC concluded that “[w]hile the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media.” *1978 Policy Statement*, *supra*, at 980 (footnotes omitted).

<sup>34</sup> The FCC cited research showing that audience survey data tends systematically to underestimate black or Spanish-speaking audiences and often fails to measure and report adequately their listening habits. *See Minority Ownership Taskforce Report* at 22-24 (1978). “The rating services have been accused of subjecting ethnic media to gross prejudices and generalizations. This problem has been traced, in large part, to the absence of minorities in decision-making positions with advertising agencies or the major corporate advertisers.” *Id.* at 25. In light of the FCC’s own doubts, Judge Silberman’s reliance on a station owner’s response to the demands of the marketplace to ensure diversity, *see Silberman op.* at 42, is unconvincing. The FCC’s Taskforce Report rejected such reliance as unacceptable in view of its diversity mandate.

Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because *it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience*. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain under-

believe that the distress sale policy satisfies the *Croson* Court’s requirement that racial preferences be employed only after race-neutral methods have been found wanting. *See Croson*, 109 S.Ct. at 728; *see also Silberman op.* at 27.

The history of the FCC’s efforts in this field thus demonstrates that the distress sale policy was adopted only after other means had proven unsuccessful in enhancing minority access to the mass media.<sup>35</sup> Despite the

served and the larger, nonminority audience will be deprived of the views of minorities.

*Minority Ownership Taskforce Report*, *supra*, at 1 (emphasis added). While Judge Silberman cites the deregulatory rulemakings of the past decade to support the proposition that market forces now are sufficient to create diverse programming, *see Silberman op.* at 42-43 (citing the FCC’s *Steele* Brief), none of the cited rulemakings revisit, let alone directly call into question, the explicit findings of the Commission in its minority ownership rulings.

<sup>35</sup> Judge Silberman argues that the proliferation of new media outlets and technologies obviates the traditional “scarcity of the spectrum” rationale that supported the FCC’s diversity of programming policies. *See Silberman op.* at 38. Even assuming some validity to its argument, the majority never comes to grips with the failure of sheer numbers of media alone to affect the structural barriers to increased minority ownership of broadcast properties. We know already that these same barriers operate just as acutely in cable and other media as they do in radio and television. Underrepresentation of minority voices in programming is not cured by greater numbers and varieties of mass media if they continue to be controlled by nonminority enterprises. *See Hammond, Now You See It, Now You Don’t: Minority Ownership in an “Unregulated” Video Market Place*, 32 Cath. U. L. Rev. 633, 638, 662 (1983). Underrepresentation of minority views in television is particularly troubling. The impact of television on our daily lives, and those of our children, is unquestionably greater than that of print media.

Unlike print, television does not require literacy. Unlike the movies, television is “free” . . . and it is always running. Unlike the theater, concerts, movies, and even

FCC's recent equivocation about the effectiveness of the distress sale policy, Congress has not equivocated at all but has directly mandated that the Commission stay the course. For twenty years, moreover, no one (neither the Commission nor the courts nor Congress) doubted the reasonableness of the ownership-programming connection. Now, the Commission<sup>36</sup> and my colleague entertain second thoughts and want more proof. Congress, however, remains steadfast in its belief that the nexus between diverse ownership and diverse programming exists, and I believe that the record fully supports that congressional determination.

### 3. *The Significance of Racial Diversity*

The most problematic feature of the distress sale policy lies in the fact that its benefits are bestowed *solely* upon

churches, television does not require mobility. It comes into the home and reaches individuals directly. With its virtually unlimited access from cradle to grave, television both precedes reading and, increasingly, preempts it.

United States Commission on Civil Rights, *Window Dressing on the Set: An Update* 44 (1979) (quoting Gerber & Gross, *Living With Television: The Violence Profile*, 26 J. Comm. (Spring 1976) at 176).

<sup>36</sup> In fact, it would appear that the Commission's doubts have been short-lived. As Judge Silberman acknowledges, *see* Silberman op. at 11, the FCC's brief in *Winter Park Communications v. FCC*, Nos. 85-1755 and 85-1756 (D.C. Cir., argued Nov. 21, 1988), supports the continued use of minority preferences within the FCC's comparative licensing procedures. Certainly the use of race in comparative hearings is distinguishable from the present case; and it is not clear whether the Commission, if given the choice, would retain the distress sale policy. Both policies, however, presume a connection between programming content and the race of a station owner; given the Commission's stance in *Winter Park*, it would appear that the FCC now believes that the nexus exists. In light of the Commission's most recent pronouncements, Judge Silberman's reliance on the FCC's earlier brief in *Steele*, *see* Silberman op. at 38, 40, 42-43, appears imprudent.

minority buyers. The distress sale policy is not a set-aside: no pre-determined number of stations is reserved exclusively for minority ownership. It must nevertheless be acknowledged that distress sales reserve certain opportunities to minority purchasers alone, and that the Commission's approval or rejection of a proposed sale will be made without considering the qualifications of non-minority competitors. The plan therefore more closely resembles the admissions program struck down in *Bakke*, rather than the Harvard Plan, noted approvingly in Justice Powell's opinion, which provided that minority status would be an advantage but would not be an absolute requirement for any admissions slot.<sup>37</sup> Judge Silberman suggests that this factor alone is sufficient to invalidate the program. I do not believe, though, that governing precedents require this result.

To begin with, it should be noted that Justice Powell was the only member of the *Bakke* Court who perceived a constitutional distinction between an affirmative action plan which reserved a specified number of slots for minority candidates and a plan which employed race as a plus-factor in admissions decisions. The other four Justices who reached the constitutional question expressly denied that any such constitutional distinction exists. *See Bakke*, 438 U.S. at 378-79 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.). Furthermore, subsequent decisions of the Supreme Court have made it clear that the Constitution does not prohibit every af-

<sup>37</sup> This is also the principal distinction between the distress sale policy and the FCC's comparative licensing procedures. The *West Michigan* court emphasized that comparative hearings involve "a consideration of minority status as but *one* factor in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters." 735 F.2d at 613 (emphasis in original). The court stated, however, that "[i]n giving special weight to [this] factor[] we in no way imply that [it] would be essential to the constitutionality of a government affirmative action program." *Id.* at 614.

firmative action plan which reserves particular opportunities exclusively for minority applicants.

*Fullilove*, after all, upheld a plan which reserved a specified percentage of government business for minority contractors. Justice Powell voted to sustain the plan, and the basis on which he distinguished the case from *Bakke* is highly instructive. Justice Powell did not rely on a distinction between affirmative action plans designed to promote diversity and plans intended to remedy prior discrimination. Rather, he emphasized the broad powers of Congress: "I [do not] conclude that use of a set-aside always will be an appropriate remedy or that the selection of a set-aside by any other governmental body will be constitutional [citing *Bakke*]. The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body." *Fullilove*, 448 U.S. at 515-16 n.14 (Powell, J., concurring).

Nor do the Court's opinions in *Wygant* support the proposition that Judge Silberman advances today. The Court struck down the challenged affirmative action plan, with Justices Powell, O'Connor, and White writing opinions in support of the judgment. No Justice suggested, however, that the *Wygant* plan could be invalidated solely on the ground that it employed a numerical formula to determine the portion of the teaching staff to be reserved for minorities. In more recent cases involving court-ordered remedies for specific discriminatory practices, the Court has upheld the use of numerical quotas where less severe steps have proven unavailing. See *supra* n.1.

In light of subsequent decisions, I read *Bakke* to hold, at most, that an affirmative action plan which uses a "plus-factor" approach is preferable to a plan reserving specified opportunities for minorities, if the two plans will be equally effective in achieving their remedial goals. In the present case, however, I believe that there are

ample grounds for concluding that a plan utilizing a "plus-factor" approach would not be sufficient. The dramatic statistical underrepresentation of minorities noted by the FCC and Congress, see *Minority Ownership Task-force Report* (Commission in 1978 notes one percent minority ownership); 1987 *Hearings* at 17 (Congress noting "mere 2 percent" ownership) (statement of Sen. Lautenberg), underscores why policies aimed merely at encouraging general diversity have proven inadequate. The Commission's general pursuit of diversified broadcasting has failed miserably in achieving meaningful minority representation. 1978 *Policy Statement, supra*, at 980, 982. Significantly, the FCC made no similar findings of underrepresentation of various "professions" or "religions," which Judge Silberman groundlessly claims are equally good targets for a diversity preference. See Silberman op. at 40. A narrowly focused program is justified both by the particular importance of racial equality and by the lack of success of less carefully targeted efforts.

It is also important to point out that the FCC has simultaneously followed the "plus-factor" approach to licensing by affording enhancement credits for minority ownership and management in comparative hearings. Both Congress and the FCC, however, have found that this technique alone simply does not do the job:

It is clear that the current comparative hearing process has not resulted in the award of significant numbers of licenses to minority groups. Many minority applicants are simply unable to participate in comparative hearings which often take a considerable period of time and require substantial economic resources.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 44 (1982) (emphasis added). Thus, where diversity of ownership has not proven practically attainable through a multifaceted evaluation of the "total" applicant, as may work

in student admissions, it does not seem unreasonable to target previously identified financial barriers to minority access.

### C. *Effect Upon Nonminority Applicants*

Past Supreme Court decisions, as the majority points out, have evaluated affirmative action schemes by assessing the burdens they impose on innocent nonminorities. Those burdens have been measured in different ways. In *Fullilove*, for example, the Chief Justice, in finding the 10% minority set-aside for construction contracts constitutional, focused on its relatively small impact on total procurement opportunities. See *Fullilove*, 448 U.S. at 484-85 & n.72 (Opinion of Burger, C.J.).<sup>38</sup> In *Wygant*, the plurality repeatedly emphasized that a plan incorporating hiring goals for minorities imposed a lesser burden on nonminorities than a layoff preference,<sup>39</sup> a distinction that Justice Powell found persuasive in *Local 28* as well. See *Local 28*, 478 U.S. at 488 (Powell, J., concurring).

These standards, it seems to me, recognize two distinct ways in which an affirmative action plan may be said to impose excessive burdens on innocent nonminorities. The *Fullilove* standard focuses on the burden placed on non-

<sup>38</sup> The Chief Justice noted that it was "not a constitutional defect in [the minority business enterprise set-aside provision] that it may disappoint the expectations of nonminority firms," 448 U.S. at 484, especially given that the 10% minimum minority participation translated into only 0.25% of the annual expenditure for construction work in the United States. *Id.* at 484-85 n.72.

<sup>39</sup> The *Wygant* plurality reasoned that "[i]n cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose." 476 U.S. at 282 (emphasis in original).

minority applicants *as a group*: the statistical inquiry ensures that minorities will not be allocated an exorbitant portion of the opportunities in a given sphere. The *Wygant* standard focuses on the burdens imposed on particular nonminority individuals. The distress sale policy satisfies both these standards.

The distress sale policy imposes minimal burdens on nonminority license applicants as a group. By its very terms, it may be invoked at the Commission's discretion only with respect to a small fraction of all broadcast licenses (those designated for revocation or renewal hearings on the basis of basic qualification issues), and only when the licensee chooses to sell out at a distress price rather than go through with the hearing. Unlike the University of California admissions plan found unconstitutional in *Bakke*, 438 U.S. at 289 (Opinion of Powell, J.), no specific number of licenses is set aside for allocation to minorities through the distress sale mechanism. Instead, the distress sale policy merely offers an alternative and largely unpredictable procedural route for license applications. The circumstances in which distress sales arise are rare and only a small number are approved; as of the briefing of this case, the distress sale policy had resulted in the transfer of only thirty-three stations to minority-controlled businesses in seven years. These distress sales represent 0.28% of all broadcast stations in the United States,<sup>40</sup> far below the 10%

<sup>40</sup> See Brief amicus curiae of National Black Media Coalition, the League of United Latin American Citizens, and the NAACP, at 33 (filed July 15, 1985). The FCC also noted the small number of distress sale assignments when it recently sought comments on revising the policy. See Notice of Inquiry, 50 Fed. Reg. at 42,048 n.6 (1985).

Judge MacKinnon correctly notes that neither Congress nor the Commission has established a numerical limit on the number of stations that may be transferred pursuant to the distress sale policy. See MacKinnon *op.* at 9. Experience over an extended period of time, however, has belied any

of annual public works appropriations directed to minority businesses in *Fullilove*.

Thus, the distress sale policy imposes far less severe burdens upon nonminorities as a group than did *Fullilove*'s MBE set-aside. As in *Fullilove*, nonminority firms remain free to compete for the vast majority of licensee opportunities available. Furthermore, even when the Commission considers a distress sale, it does not refuse to entertain nonminority petitions for access to the license in question. Interested nonminority parties can oppose both the licensees' election of the distress sale procedure and the specific transaction proposed to the Commission. "A distress sale . . . is a form of extraordinary relief and depends on the facts and circumstances of the individual petition." *Faith Center, Inc.*, 82 F.C.C.2d 1, 35 (1980).<sup>41</sup>

Nor does the distress sale policy impose an unacceptable burden on particular nonminority individuals such as Shurberg. The Supreme Court has looked most skeptically at affirmative action programs involving layoffs because firings inevitably involve a greater disruption of settled expectations. See *Wygant*, 476 U.S. at 282-83 (Opinion of Powell, J.) ("Denial of a future employment opportunity is not as intrusive as loss of an existing job").<sup>42</sup>

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notion that distress sales will account for a substantial percentage of the country's broadcast outlets. Against this backdrop it would seem perverse to invalidate the policy based on a theoretical possibility that the program might some day be overused.

<sup>41</sup> The Commission, in fact, refused to allow distress sale treatment for two other *Faith Center* stations and nonminority firms filed applications for both licenses. *Faith Center, Inc.*, 82 F.C.C.2d 1 (1980), *recons. denied*, 86 F.C.C.2d 891 (1981).

<sup>42</sup> Compare *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (holding voluntarily adopted racial quotas permissible

Since the distress sale policy involves entry into a market, it is far more analogous to "hirings" than to "firings." The interest of a potential applicant in obtaining a license through comparative hearings where the current licensee's fitness is in doubt is even more speculative than an applicant's interest in a potential job and certainly lacks the legitimate expectation of continued employment of someone already working. The current licensee's troubles create a lucky-strike-extra situation for potential applicants: unexpectedly, a valuable license becomes available and the former licensee's broadcasting property dramatically decreases in value. Because of the unique and unpredictable nature of such situations, a distress sale can hardly be said to disrupt the settled expectations of potential licensees.

Plainly the distress sale policy imposes disadvantages on innocent nonminority applicants, and I do not intend to belittle their hardships. A broadcast license is a valuable property; only a few become available; and the licenses are not fungible.<sup>43</sup> Nevertheless, I do not believe that Shurberg's injury can plausibly be compared to the hardship suffered by one who, like the senior teachers in *Wygant*, is deprived of an existing source of livelihood.<sup>44</sup>

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under Title VII) and *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986) (approving hiring and promotion preferences in consent decree) with *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (invalidating racial quota that required layoffs).

<sup>43</sup> I recognize that Shurberg may have a difficult time acquiring another television station. In this respect, however, the distress sale policy is no different from the use of race in comparative licensing procedures, a practice which has been repeatedly upheld by this court.

<sup>44</sup> Writing for the *Wygant* plurality, Justice Powell noted that "[e]ven a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation

Shurberg claims only that as a result of the distress sale it was denied participation in a single comparative hearing in which it *might* have been awarded the license. And its exclusion from that hearing forecloses "only one of several opportunities," *see Wygant*, 476 U.S. at 283 (Opinion of Powell, J.). Shurberg has been rendered no worse off than it was before Faith Center's fortuitous misconduct;<sup>45</sup> it has simply been denied a chance at a windfall.

It should also be noted that neither Shurberg nor any other nonminority applicant is denied *financial* participation in enterprises that qualify for distress sale treatment by reason of the racial composition of their owners or managers. As a matter of fact, in order to lessen the financial obstacles to increased minority ownership, the FCC will accept applications for sales to limited partnerships, in which management and control reside pri-

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of earning the stability and security of seniority. . . . Layoffs disrupt these settled expectations in a way that general hiring goals do not." 476 U.S. at 283. Plainly Shurberg has not suffered the sort of injury which Justice Powell associated with layoffs. Justice Powell himself analogized "hiring" plans to school admissions preference schemes, stressing that the foreclosing of an opportunity does not cause the same kind of injury as the deprivation of something the innocent party already has. *See Wygant*, 476 U.S. at 283 n.11. Justice White's concurrence, which provided the fifth vote to strike down the *Wygant* plan, rested exclusively on this distinction. 476 U.S. at 294-95. *See supra*, p. 17 n.18.

<sup>45</sup> Judge MacKinnon attaches constitutional significance to the fact that Faith Center's misconduct was unrelated to racial discrimination. *See MacKinnon op.* at 11. Surely this can make no difference. When racial preferences are used in the distribution of scarce resources, the Constitution does not require that the resources themselves must be the product of past discrimination. Clearly the government contracting opportunities at issue in *Fullilove* did not become available because of any discriminatory act.

marily with qualified minority general partners but substantial financial rewards flow to nonminority limited partners who have provided the necessary capital. *See 1982 Policy Statement, supra*, at 853-55.<sup>46</sup> In sum, the near-monopoly exercised by nonminorities over broadcast media—they control approximately 98% of all broadcast licenses—and the very limited circumstances in which the distress sale policy can be invoked, suggest that the burden the policy places on nonminority applicants is acceptable.<sup>47</sup>

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<sup>46</sup> Judge Silberman does not see how this alternative "affect[s] [Shurberg's] constitutional claim." Silberman *op.* at 33 n.23. It is obvious, however, that the distress sale policy does allow nonminorities to share in the admittedly substantial financial benefits, *see Silberman op.* at 28, created by a license revocation situation, *see supra* note 9, and thus its burden is lighter than the burden of a hypothetical program reserving all profits to minorities.

<sup>47</sup> My colleagues err in focusing only on the individual burden borne by Shurberg (which they exaggerate), forgetting the Supreme Court's admonition that innocent parties may sometimes be asked to bear the burden of affirmative action programs. *See Wygant*, 476 U.S. at 280-81 (Opinion of Powell, J.) ("[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy"). An absolutist prohibition on any such transfer would call into question virtually all of the affirmative action programs at universities because in most cases some nonminority applicant loses his opportunity to enter the college of his choice. Similarly, it places in doubt affirmative action programs in the workplace because often an unhired nonminority applicant may not have any other opportunity to ply his trade in the same community. These are serious burdens for individuals, but they have not been held to invalidate otherwise legitimate affirmative action programs. My colleagues' approach suggests—erroneously in my view—that affirmative action is permissible only when nothing very important is at stake, when such a superabundance of opportunity exists that no one need go without.

#### D. *Remedying Past Discrimination*

As I noted earlier, *see supra*, pp. 17-19, it is somewhat deceptive to speak of a sharp distinction between the government's desire to promote broadcast diversity and its desire to remedy past discrimination. Certainly it is appropriate to distinguish between the attempt to further public access to varied programming and the attempt to advance the economic interests of minority broadcasters. But the effort to promote broadcast diversity is itself, in a broad sense, a "remedial" program: it seeks to address the lasting effects of our nation's long history of racial discrimination. I will acknowledge, however, that the term "remedial" is sometimes used (as Judge Silberman uses it, *see* Silberman op. at 21) to refer only to programs designed to benefit members of the previously victimized race.<sup>46</sup> I do wish to offer a few brief observations concerning programs of this sort.

The Court in *Croson*, while sharply limiting the power of state and local governments to institute affirmative action programs, acknowledged the expansive authority of Congress to mandate racial preferences. Justice O'Connor's plurality opinion recognized that "Congress may

<sup>46</sup> Judge Silberman suggests that I am unclear as to whether the distress sale policy is in fact a "remedial" program. *See* Silberman op. at 23 n.13. The confusion, I would submit, stems from the ambiguous nature of the term "remedial." The distress sale program is not "remedial" in the narrow sense in which that term is sometimes used: its purpose is not to compensate particular minority individuals for past injustices by providing them with increased economic opportunities in broadcasting. It is, however, "remedial" in a broader sense: it seeks to address (or remedy) a societal problem (the underrepresentation of minorities in the broadcast field, and the consequent lack of diverse programming) which has been caused by past racial discrimination. I therefore believe that the Supreme Court's repeated references to the broad remedial powers of Congress bolster congressional authority to implement this program as a means of enhancing diversity. *See supra*, pp. 17-19.

identify and redress the effects of society-wide discrimination," 109 S.Ct. at 719; *see also id.* at 736-37 (Scalia, J., concurring). The three dissenters, who would extend broad remedial authority to other public entities, would surely not deny it to Congress. I read *Croson* as reaffirming a broad congressional authority to employ race-based remedies to ameliorate the position of previously disadvantaged racial groups. Congress is not restricted to addressing problems caused by its own prior discrimination, nor is it required to identify particular instances of discrimination as a predicate for remedial action.

In the present case, I have focused exclusively on the goal of enhancing broadcast diversity. This is because Congress, in mandating continued implementation of the distress sale policy, relied exclusively on the diversity rationale. There is simply no indication that Congress was motivated, even in part, by a desire to improve the lot of minority broadcasters. My emphasis on the diversity rationale in this case should not, however, obscure my strong conviction that Congress retains broad authority to employ race-based measures in other areas to enhance the economic situation of those who have previously been the victims of lasting and pervasive discrimination.

#### IV. CONCLUSION

The majority has struck down a program mandated by Congress, one that is part of a broader and constantly evolving effort to ensure diversity in programming through diversity in ownership. The congressional decision was hardly an uninformed choice: Congress acted on the basis of nearly a decade of experience with the distress sale policy. Judge Silberman's principal error lies in his failure to give due weight to the considered judgment of Congress. That error is compounded by his denigration of the public interest in programming di-

versity and his failure to fully credit the precedents of this circuit.

Congress, despite the agency's misgivings, has ordered the continuation of a limited minority access scheme designed to promote diversification in broadcasting through the elimination of identified structural barriers that have traditionally burdened minority ownership. Its distress sale policy is narrowly tailored to address the critical entry barriers to minority participation in media ownership while imposing only minimal burdens on innocent third parties. I do not believe that so modest and targeted a program furthering such a compelling aim violates the Constitution. I therefore respectfully dissent.

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

BC Docket No. 80-730  
File No. BRCT-348

In re Application of  
Faith Center, Inc.  
Hartford, Connecticut  
For Renewal of License

**Memorandum Opinion And Order**

Adopted: November 9, 1984; Released: December 7, 1984

BY THE COMMISSION: COMMISSIONER PATRICK CONCURRING  
IN THE RESULT.

1. The Commission has before it: (a) a Petition for Extraordinary Relief, filed April 19, 1984, by which Shurberg Broadcasting of Hartford, Inc. (Shurberg) requests that we designate its application (File No. BPCT-831202KF) for a comparative renewal hearing together with the license renewal application of Faith Center, Inc. to determine which applicant should operate a commercial television station on Channel 18 in Hartford, Connecticut; (b) an Opposition to (a) filed May 30, 1984 by The Department of Communications of the Capitol Region Conference of Churches, the Management Team of the Christian Conference of Connecticut and Sherman G. Tarr (henceforth "Citizens"), through their attorneys the Media Access Project; (c) a Reply to (b) filed June 4, 1984, by Shurberg; (d) a Petition for Special Relief filed June 28, 1984, by Faith Center, Inc. (Faith) in which Faith requests authority to assign the license of Station WHCT-TV, Chan-

nel 18, Hartford, Connecticut to Astroline Communications Company Limited Partnership (Astroline) pursuant to the Commission's distress sale policy announced in our *Statement of Policy on Minority Ownership of Broadcasting Facilities*;<sup>1</sup> (3) Comments in Opposition to (a) and Comments in Support of (d) filed July 23, 1984, by Astroline; (f) Comments on (a) and (d) filed July 23, 1984, by the Chief, Mass Media Bureau; (g) Comments and Statement in Support of Petition for Special Relief filed July 23, 1984, by Citizens; (h) Petition for Special Relief filed July 23, 1984, by Media Access Project (MAP); (i) Comments on (d) filed July 23, 1984 by Interstate Media Corporation (IMC);<sup>2</sup> (j) Consolidated Comments filed July 23, 1984 by Shurberg; (k) Response to (a) filed July 23, 1984, by Faith; (l) Reply Comments filed August 2, 1984, by Shurberg; (m) Comments in Response to (i) filed August 2, 1984, by Astroline; (n) Motion for Acceptance of Late-Filed Reply Comments<sup>3</sup> and Comments in Response to (j) filed August 3, 1984, by Astroline; (o) Motion to Accept Late-Filed Reply Comments<sup>4</sup> and Reply Comments filed August 3, 1984,

<sup>1</sup> 68 F.C.C. 2d 979 (1978), as revised, 92 F.C.C. 2d 849 (1982). On June 28, 1984, Faith and Astroline also filed an assignment application for Station WHCT-TV (File No. BALCT-840629KS) and a Petition for Expedited Processing of Faith's Petition for Special Relief and the related assignment application for authority to assign WHCT-TV from Faith to Astroline.

<sup>2</sup> We have accepted IMC's Comments in the interest of allowing all concerned parties to express their views about these matters. Nevertheless, we have refrained from considering IMC's allegations of misconduct concerning negotiations for the sale of station WHCT-TV, which have also been filed in a civil lawsuit, since such allegations are private matters not within our jurisdiction. See *In Re Application of North Dakota Broadcasting Company, Inc. and Central Minnesota Television Company*. 69 F.C.C. 2d 1756, 1760 (1978). In this light, Faith's Motion to Strike IMC's Comments will be granted to the extent that IMC's allegations of misconduct on Faith's part are concerned and will otherwise be denied.

<sup>3</sup> For good cause shown, this motion will be granted.

<sup>4</sup> For good cause shown, this motion will be granted.

by Citizens; (p) Reply Comments filed August 16, 1984, by IMC;<sup>5</sup> (q) Motion to Strike (i) filed September 6, 1984, by Faith; (r) Opposition to (q) filed September 28, 1984 by IMC; (s) a Supplement to (h) filed October 15, 1984, by MAP; (t) a Supplemental Motion for Expedited Processing filed October 24, 1984, by Astroline; and (u) a Second Supplement to (h) filed October 29, 1984, by MAP.

2. Shurberg's Petition for Extraordinary Relief seeks a remedy which is inconsistent with the remedy sought by Faith in its Petition for Special Relief. Thus, if the Commission grants Shurberg's petition and consolidates Shurberg's application with that of Faith in a comparative hearing, we could not grant Faith's current request for permission to sell Station WHCT-TV pursuant to our distress sale policy.<sup>6</sup> Therefore, we are considering both of these petitions at the same time, within the context of Faith's renewal proceeding in BC Docket No. 80-730. By Order, FCC 84I-69, released July 3, 1984, our General Counsel afforded all relevant parties the opportunity of filing comments on these two pleadings, as well as replies to those comments, in this renewal proceeding. As we shall explain below, we have decided to conditionally grant Faith's third request for authority to sell its Hartford, Connecticut, television station pursuant to our distress sale policy.

3. Faith is the licensee of Station WHCT-TV, which operates on television channel 18, Hartford, Connecticut. In November 1980, the renewal application of Station WHCT-TV was designated for hearing to determine whether Faith was qualified to remain a Commission li-

<sup>5</sup> These Reply Comments will be dismissed as an unauthorized pleading. The pleading repeats allegations contained in IMC's Comments and attempts to reply to Astroline's Reply Comments. We have not solicited any Replies to Reply Comments.

<sup>6</sup> See *Clarification of Distress Sale Policy*, 44 Rad. Reg. (P&F) 2d 479, 480 n.3. (1978).

censee. Faith indicated its intention to take advantage of our distress sale policy;<sup>7</sup> and subsequently, Faith came forward with a prospective purchaser of Station WHCT-TV. We granted its renewal application and its request to sell the station pursuant to our distress sale policy, subject to the conditions that the Broadcast Bureau (now the Mass Media Bureau) would find the purchaser fully qualified to be a Commission licensee and that the assignment of WHCT-TV's license would be consummated within 90 days of the Bureau's favorable determination.<sup>8</sup> If those conditions were not met, Faith's renewal application was to return to hearing status. In fact, the purchaser was unable to consummate the transaction and Faith's application was returned to hearing status.

4. After its first distress sale failed, Faith filed a second request to sell its station under our distress sale policy to Interstate Media Corporation (IMC). In our Memorandum Opinion and Order, FCC 83-448, released September 30, 1983, we granted Faith's second Petition for Special Relief by which it sought to sell Station WHCT-TV to IMC and granted its renewal application, subject to the conditions that the Mass Media Bureau would find IMC fully qualified to be a Commission licensee and that the assignment of the station's license would be consummated within 90 days of the Bureau's grant of the assignment application becoming final. If those conditions were not met, Faith's renewal application would automatically return to hearing status. The second distress sale was not consummated, and the Administrative Law Judge presiding in Faith's renewal proceeding announced that Faith's application had returned to hearing status pursuant to the Commission's September 1983 Memorandum Opinion and Order.<sup>9</sup> Faith's

<sup>7</sup> See *Faith Center, Inc.*, 83 F.C.C. 2d 401 (1980), *recon. denied*, 86 F.C.C. 2d 891 (1981).

<sup>8</sup> 88 F.C.C. 2d 788, 794-95 (1981).

<sup>9</sup> See the ALJ's Order, FCC 84M-1834, released April 16, 1984.

current Petition for Special Relief filed June 28, 1984, requests authority to assign the license of Station WHCT-TV to Astroline Communications Company Limited Partnership (Astroline) pursuant to our distress sale policy.

5. In its Petition for Extraordinary Relief filed April 19, 1984, Shurberg seeks to have its application (File No. BPCT-831202KF) for authority to operate on Channel 18, in Hartford, Connecticut, designated for hearing with the license renewal application of Faith Center, Inc. Shurberg observes that broadcast licenses for stations in Connecticut were scheduled to expire on April 1, 1984. See Section 73.1020(a)(16) of our Rules. Applications for renewal were required to be filed on or before December 1, 1983, and applications mutually exclusive with those renewal applications were due by March 1, 1984. See Sections 73.3539 and 73.3516(e) of our Rules. Shurberg's competing application was filed on December 1, 1983. According to Shurberg, the Commission's September 1983 Memorandum Opinion and Order granted Faith's renewal application, thereby opening a "window" for the filing of competing applications. In this regard, Shurberg asserts that we could only grant Faith's license through April 1, 1984, in our September 1983 Order because the then current license term for Connecticut broadcast stations ended on April 1, 1984.

6. Shurberg's argument is based on several erroneous assumptions. First, Faith's renewal application has not been granted. Our September 1983 Order explicitly stated that Faith's renewal application was granted subject to two conditions and that if either condition was not met, Faith's application would revert to hearing status. Since one of those conditions was that Faith and IMC consummate the assignment of Station WHCT-TV's license within 90 days of the grant of the relevant assignment application becoming final, and since that condition was never met, Faith's renewal application automatically reverted to hearing status. Second, the "window" for filing competing ap-

plications against the renewal applications of Connecticut broadcast stations, which opened for most Connecticut stations during the period from December 1, 1983, through March 1, 1984, never opened for Station WHCT-TV. There was no requirement that Faith file a renewal application for the period of 1984 through 1989, since Faith's 1977 renewal application was and remains in hearing status and competing applications cannot be filed until the proceeding has been terminated.

7. Section 307(c) of the Communications Act of 1934, as amended,<sup>10</sup> provides that licenses of broadcast stations whose renewal applications are in hearing status shall remain in effect pending final disposition of the hearing case. Moreover, competing applications are ordinarily not permitted to be filed against license renewal applications designated for hearing. *See, e.g., RKO General, Inc.*, 89 F.C.C. 2d 297, 315-26 (1982), *affirmed sub nom. Atlantic Television Corporation v. F.C.C.*, No. 82-1263 (D.C. Cir. Oct. 21, 1982). Thus, Faith's renewal application for station WHCT-TV has been placed in protected status from competing applications until the completion of its renewal proceeding, and Faith would not have to file a new or supplemental renewal application during the course of this proceeding. While a licensee whose renewal application is in deferred status must file a supplemental renewal application on the date a regular renewal application would otherwise be due, and while the filing of such a supplemental renewal application would open a three month "window" during which competing applications may be filed, *see Carlisle Broadcasting Associates*, 59 F.C.C. 2d 885 (1976), it is clear that Shurberg had no such right as of December 1, 1983, to file a competing application against

<sup>10</sup> Section 307 (c) of the Communications Act of 1934, as amended, was designated as such by Public Law 97-259, approved September 13, 1982, 96 Stat. 1087, 1093. The former Section 307(c) was deleted and the former Section 307(d) became Section 307(c).

the renewal application for Station WHCT-TV pending in this proceeding.

8. Shurberg asserts that the factual situation in this proceeding is very similar to the situation faced by the U.S. Court of Appeals for the District of Columbia Circuit in *New South Media Corp. v. FCC, (New South)*, 685 F.2d 708 (1982). *New South* involved a situation where the Commission had, in 1977, granted several of RKO General, Inc.'s renewal applications, although it conditioned those grants on the outcome of the Boston, Massachusetts, comparative television renewal proceeding. In late 1980, following its decision denying RKO's Boston license, the Commission decided to hold non-comparative hearings to determine what action, if any, should be taken against RKO's remaining thirteen stations. Rather than wait for the license of each station to expire in the normal course and call at that time for renewal applications which would be subject to competing applications, the Commission chose to "reopen," i.e., designate for hearing, the 1977 grants which had been expressly conditioned on the outcome of the Boston proceeding.

9. Thus, in the *New South* situation, the Commission chose to proceed without waiting for challenges by competing applicants, primarily because the "public interest need for clear resolution of RKO's qualifications outweighs the benefits of possibly having a choice of applicants." *RKO General, Inc.*, 82 F.C.C. 2d 291, 310 (1980). On appeal, the Court reversed the Commission. *New South Media Corp. v. FCC, supra*. Although the Commission had designated all thirteen 1977-79 RKO license renewals for hearing shortly before three of the licenses in question were due to expire, it had set no specific time for the actual commencement of the hearing; rather, it had stated that the hearings would begin after all court appeals in the Boston proceeding had been completed. In 1982, when the Court issued its *New South* decision, all but one of the thirteen license renewals had run past three years, no

renewal hearing had actually commenced, and there was "no evidence-taking underway, no proceeding in mid-stream or even launched."<sup>11</sup> Thus, the Court determined that the situation in *New South* whereby conditional renewals were, in effect, extended, was similar to the renewal deferred for three years in *Carlisle Broadcasting Associates, supra*, and that competing applicants should be allowed to file against RKO's license renewal applications.

10. Clearly, *New South* does not directly dictate the result that we should reach in this case. In *New South* the court distinguished between the situation in which an application remains in hearing status, protected from competing applications, because some relevant action, such as an evidentiary hearing, is actually under way and the situation in which an application that, while designated for hearing, is in effect simply being deferred because no action is being taken or is reasonably foreseeable. 685 F.2d at 715-16. In this case action was not simply deferred on Faith Center's renewal application. The application was designated for hearing to permit Faith Center to invoke our distress sale policy.<sup>12</sup> Faith Center did, in fact, twice propose assignments of its license to minority-controlled buyers. If it had been able to consummate either of those transactions, it would have been promptly replaced by a new licensee that would have furthered the minority ownership goal of increased diversity of broadcast station ownership. Unfortunately, as discussed above, Faith Center has been unable to consummate either of these two pre-

<sup>11</sup> 685 F. 2d. 708, 716.

<sup>12</sup> See *Faith Center, Inc.*, 48 Rad. Reg. (P&F) 2d 741 (1978). The Commission's distress sale policy permits licensees "whose renewal applications have been designated for hearing on basic qualification issues . . . to transfer or assign their licenses at a 'distress sale' price to applicants with a significant minority ownership interest. . . ." 68 F.C.C. 2d 979, 983 (1978).

vious distress sale assignments that we have authorized.<sup>13</sup> Faith Center has now sought a third distress sale authorization more than three years after we first designated its application for hearing. We are, therefore, now faced with determining whether the public interest in permitting competing applications to be filed, as articulated in *New South*, outweighs the goals of our minority ownership policies in this case.

11. Although this is a close question, it is our judgment that the Commission's minority ownership policies, as reflected here in the distress sale proposal, are sufficiently important to warrant maintaining Faith Center's renewal application in hearing status, protected from competing applications, for a sufficient additional time to permit us to consider the pending application to assign the license to Astroline. A successful assignment of Station WHCT-TV's license pursuant to our distress sale policy would result in the rapid conclusion of this renewal proceeding, would swiftly end Faith Center's tenure as a licensee of this station and provide residents of the station's service area with a new licensee whose qualifications are not in doubt, would advance our important policy of increasing diversity of programming and ownership in the broadcast industry by providing for minority group ownership and control of this station, and would avoid a lengthy and expensive comparative renewal proceeding. Therefore, we

<sup>13</sup> Although the record is not clear on this point, it appears that each of these assignments fell through largely because of difficulties incurred by the minority-controlled assignees in obtaining adequate financing. Our studies have shown that one of the major stumbling blocks to increased minority ownership and participation in broadcasting is the difficulties that minority controlled applicants traditionally have faced in obtaining financing to acquire and operate stations. See *Strategies for Advancing Minority Ownership Opportunities in Telecommunications: The Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications to the FCC* (May 1982).

have decided to give Faith Center an opportunity to effectuate the currently proposed distress sale of WHCT-TV. If this distress sale does not come to fruition promptly, however, we will move expeditiously to provide Shurberg and other interested parties an opportunity to file competing applications for WHCT-TV's channel.

12. In light of the foregoing, we shall grant Faith Center's Petition for Special Relief filed June 28, 1984, by which it proposes to assign WHCT-TV's license to Astroline, subject to the conditions that the Mass Media Bureau finds Astroline qualified to be a Commission licensee<sup>14</sup> and that the contemplated assignment is consummated within 60 days of the Bureau's grant of the assignment application. If either of these conditions is not met, we shall promptly require Faith Center to file a supplemental renewal application for Station WHCT-TV. Potential applicants would then be afforded a 90-day period to file applications for the station's frequency in Hartford. Thereafter, all timely-filed applications, including the application (File No. BPCT-831202KF) previously filed by Shurberg, would be designated for a comparative renewal proceeding.

13. Shurberg's arguments that our distress sale policy amounts to reverse discrimination in that only entities controlled by minority group members may purchase a station from an incumbent licensee which has been designated for a revocation or renewal hearing are without merit. In our *Policy Statement on Minority Ownership*, we found that there was an acute underrepresentation of minorities among the owners of broadcast stations and that views of racial minorities were inadequately represented in the broadcast media. 68 F.C.C. 2d 979 at 980-82. We also observed that increasing minority ownership of broadcast

<sup>14</sup> We hereby direct the Mass Media Bureau to act as expeditiously as possible upon the application (File No. BALCt-840629KS) by which Faith seeks authority to assign the license of Station WHCT-TV to Astroline.

stations would result in diversity of control of a limited resource, the broadcast spectrum, and would result in a more diverse selection of programming for the entire viewing and listening public. *Ibid. Report on Minority Ownership in Broadcasting*, issued May 17, 1978 by our Minority Ownership Task Force.

14. In addition to our own conclusions regarding minority ownership, the District of Columbia Circuit, which has exclusive jurisdiction to review FCC licensing decisions, has repeatedly defined as an important public interest objective the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations. *See, e.g., West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 609-611 (D.C. Cir. 1984); *Garrett v. FCC*, 513 F.2d 1056, 1063 n.52 (D.C. Cir. 1975); *TV 9, Inc. v. FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973); *cert. denied*, 419 U.S. 986 (1974); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971). Moreover, Congress has recently reaffirmed the importance of fostering minority ownership of broadcast stations. In amending Section 309(i) of the Communications Act, 47 U.S.C. 309(i), to facilitate the development of a random selection system (i.e., a lottery) as an alternative to the comparative evaluation process, *See Pub. L. No. 97-259*, 96 Stat. 1087, 1094-95, Congress explicitly required that significant preferences for minority applicants be incorporated into any random selection licensing scheme. In *West Michigan Broadcasting Co.*, the court stated that the passage of that legislation must be viewed as Congressional approval for the Commission's minority ownership promotion policies and confirmation of the factual bases of those policies' remedial nature. *See* 735 F.2d at 615-16. In this regard, the Conference Report contained a specific Congressional finding that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected

their participation in other sectors of the economy as well." H.R. Conf. Rep. 97-765, 97th Cong., 2d Sess. 43 (1982), reprinted in 1982 U.S. Code, Cong. & Adm. News 2237, 2287. See also *West Michigan Broadcasting*, 735 F.2d at 603 n.5. Further, the Conference Report cited our 1978 minority ownership policy statement and the *Report on Minority Ownership in Broadcasting*, as evidence of the need for the type of preferential treatment of minorities contained in the legislation. 1982 U.S. Code Cong. & Admin. News 2237, 2288. Thus Congress, which has the broadest remedial power of any governmental entity,<sup>15</sup> has recognized the need for and approved the implementation of the minority ownership policies set forth in the 1978 policy statement. We therefore must reject Shurberg's arguments against our distress sale policy.

15. After having reviewed Faith's Petition for Special Relief filed June 28, 1984, pleadings filed in relation thereto, and all the pertinent data in this docket, we have determined that the proposed sale of Station WHCT-TV from Faith to Astroline Communications Company Limited Partnership (Astroline) complies in principle with our distress sale policy. See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 979 (1978), as revised, 92 F.C.C. 2d 849 (1982). The relevant assignment application (File No. BALCT-840629KS) must still be reviewed by the Mass Media Bureau. In this Memorandum Opinion and Order, we deal only with the question of whether Faith's proposed distress sale of Station WHCT-TV meets the basic requirements for a distress sales; other aspects of the assignment application involving Astroline's basic qualifications will be determined by the Mass Media Bureau pursuant to its delegated authority.<sup>16</sup> With regard

<sup>15</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980).

<sup>16</sup> Shurberg has made several allegations to the effect that Faith has failed to comply with relevant Commission rules and policies since the time its renewal application for Station WHCT-TV was designated for

to the basic requirements for a distress sale, Shurberg contends that Astroline is not controlled by a minority group member and that Station WHCT-TV has not been properly evaluated for purposes of determining an appropriate distress sale price. As we shall explain, Shurberg's arguments are without merit.

16. Astroline is a limited partnership comprised of two general partners and one limited partner. Richard P. Ramirez, an Hispanic-American, is a general partner with a twenty-one percent ownership interest and a seventy percent voting interest in Astroline. WHCT Management, Inc., a corporation, is also a general partner with a nine percent ownership interest and a thirty percent voting interest in Astroline.<sup>17</sup> Astroline Company, which is an investment company separate and distinct from Astroline Communications Company Limited Partnership (Astroline), is the limited partner and holds seventy percent ownership in Astroline. Astroline explains that its two general partners have complete authority over its affairs and vote in accordance with their respective partnership interests. Although Astroline Company will provide Astroline with \$500,000 by means of a capital contribution, a loan or a combination of the two, Astroline Company and Astroline have stated that Mr. Ramirez' ownership interest in Astroline and his voting control over Astroline will not be diminished by Astroline Company's capital contribution.

hearing. Even if the allegations are assumed to be true, they would not prevent us from approving the distress sale herein and do not require any action by us at this time, since the renewal applicant's qualifications are not a relevant consideration in a distress sale situation. If the distress sale proposed herein is not effectuated and a comparative renewal proceeding ensues, Shurberg is free to raise any of these allegations in that proceeding.

<sup>17</sup> Astroline has also expressed its intention to transfer 4% of Astroline's ownership (4/9ths of WHCT Management, Inc.'s 9% interest) to minority group members in order to increase the total minority group interest in Astroline to twenty-five percent.

Further, Astroline and Astroline Company assert that they will structure all transactions to maintain Mr. Ramirez' voting control over the affairs of the company and to insure that minority group persons have at least a 21 percent ownership interest in Astroline.

17. We hold that Astroline's ownership structure complies with our distress sale policy, as revised in *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C. 2d 849 (1982). Our most recent distress sale policy statement explicitly approves distress sales to limited partnerships when the controlling general partner or partners have a 20 percent ownership interest in the partnership and are members of minority groups. See 92 F.C.C. 2d at 853-55. Although Astroline has two general partners, one of which is not comprised of minority group members, the facts that operating control (70 percent voting interest) is held by a minority group member, i.e., Mr. Ramirez, and that Mr. Ramirez also holds a 21 percent ownership interest in Astroline establish that the limited partnership arrangement proposed here meets our criteria for a distress sale purchase.

18. Shurberg argues that the appraisals of WHCT-TV submitted with respect to Faith's two previously-attempted distress sales are no longer accurate because we have granted three construction permits for UHF television stations in New Haven (Channel 59), Hartford (Channel 61) and New London (Channel 26), all of which are located in Connecticut and might provide significant competition to Station WHCT-TV. Shurberg has not provided any specific data to support its generalized assertion. Further, of the three permittees which Shurberg mentions, only the permittee of Channel 61 has gone on the air and it began broadcasting in September 1984. Therefore, it does not appear that appraisers could accurately measure the impact of the competition WHCT-TV will receive from these three permittees.

19. In this regard, revised appraisals for Station WHCT-TV were provided in 1983 so that the impact of new competition from Station WTXN(TV), Waterbury, Connecticut, in the previous year could be considered in evaluating the value of Station WHCT-TV. See our General Counsel's Order, FCC 83I-26, released March 23, 1983. Of the three appraisers who evaluated Station WHCT-TV in 1981, two stated in 1983 that the station's fair market price had increased, while the third stated that the station was worth at least as much as it was in 1981.<sup>18</sup> Allowing for some limited overall inflation during the last year in light of the independent assessments presented in 1983, there is no reason to assume that the station's current value has decreased. In any event, the appropriate date for assessing the value of a station for distress sale purposes is the date on which the proceeding was designated for hearing, unless the station's value has decreased since that date. Since Faith decreased the value of its station by changing its studio site in April 1981 and by removing equipment, we relied on the appraisals of the station, as updated in September 1981, when we conditionally approved Faith's proposed distress sales in 1981 and 1983.<sup>19</sup> We believe that those appraisals are still valid for distress sale purposes.<sup>20</sup> The three appraisals, as updated in September 1981, average out to \$6,500,000. Thus the proposed sale price, \$3,100,000, is well below the ceiling we have

<sup>18</sup> *Faith Center, Inc.*, FCC 83-448, released September 30, 1983, at paragraph 10.

<sup>19</sup> *Id.*

<sup>20</sup> Shurberg has tried to resurrect an earlier claim that Faith's station lacks certain equipment and is generally overvalued. As we explained in our 1983 Order which conditionally granted Faith's second proposed distress sale, two of the three appraisers of WHCT-TV specifically considered the cost of such equipment in their 1981 appraisals. See paragraph 8 of our Order in *Faith Center, Inc.*, FCC 83-448, released September 30, 1983.

set for distress sale prices, namely 75 percent of the average fair market value.<sup>21</sup>

20. ACCORDINGLY, IT IS ORDERED, That:

(a) the Petition for Extraordinary Relief filed April 19, 1984, by Shurberg Broadcasting of Hartford, Inc. IS GRANTED to the extent indicated in this Memorandum Opinion and Order and IS DENIED in all other respects;

(b) the Petition for Special Relief filed June 28, 1984, by Faith Center, Inc., IS GRANTED subject to the conditions set forth in paragraph 12, *supra*;

(c) the Mass Media Bureau SHALL ACT AS EXPEDITIOUSLY AS POSSIBLE on the application (File No. BALCT-840629KS) by which Faith Center, Inc. seeks authority to assign the license of Station WHCT-TV to Astroline Communications Company Limited Partnership;

(d) the Petition for Expedited Processing filed June 28, 1984, by Faith Center, Inc. and Astroline Communications Company Limited Partnership and the Supplemental Motion for Expedited Processing filed October 24, 1984, by Astroline Communications Company Limited Partnership ARE GRANTED to the extent indicated in this Memorandum Opinion and Order and ARE DISMISSED as moot in all other respects;

(e) the Motion for Acceptance of Late-Filed Reply Comments filed August 3, 1984, by Astroline Communications Company Limited Partnership and the

<sup>21</sup> The settlement agreement entered into between Astroline and Citizens in connection with the assignment of Station WHCT-TV's license and filed with us on July 27, 1984, and the Petition for Special Relief filed by Media Access Project (MAP) on July 23, 1984, by which MAP seeks our approval of the reimbursement provisions of that settlement agreement, will be considered in a subsequent order.

Motion to Accept Late-Filed Reply Comments filed August 3, 1984, by The Department of Communications of the Capital Region Conference of Churches, the Management Team of the Christian Conference of Connecticut and Sherman G. Tarr ARE GRANTED:

(f) the Reply Comments filed August 16, 1984, by Interstate Media Corporation ARE DISMISSED as an unauthorized pleading; and

(g) the Motion to Strike filed September 6, 1984, by Faith Center, Inc. IS GRANTED to the extent indicated in footnote 2 herein and IS DENIED in all other respects.

21. IT IS FURTHER ORDERED That, if Faith Center, Inc. and Astroline Communications Company Limited Partnership fail to effectuate the assignment of Station WHCT-TV's license in accordance with the conditions set forth in paragraph 12, *supra*:

(a) Faith Center, Inc.'s renewal application (File No. BRCT-348) IS RETURNED to the processing line;

(b) Faith Center, Inc. IS REQUIRED to file a supplemental renewal application for Station WHCT-TV for the license period of April 1, 1984 through April 1, 1989 within 30 days after the relevant condition set forth in paragraph 12, *supra*, is not satisfied; and

(c) applications which are mutually exclusive with Faith Center, Inc.'s renewal application for Station WHCT-TV, as supplemented, MAY BE FILED during a 90-day period following the filing of the supplemental renewal application for Station WHCT-TV and WILL BE DESIGNATED FOR HEARING with the renewal application for Station WHCT-TV and the mutually exclusive application of Shurberg Broadcasting of Hartford, Inc. (File No. BPCT-831202KF).

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

Statement of Policy on Minority Ownership  
of Broadcasting Facilities

May 25, 1978

One decade ago, as a partial response to the concerns expressed in the *Report of the National Advisory Committee on Civil Disorders* ("The Kerner Report"),<sup>1</sup> the Commission articulated policies and principles which would guide it in its consideration of complaints that its licensees—or those who would be its licensees—had discriminated against minorities in their employment practices.<sup>2</sup> We observed that "we simply do not see how the Commission could make the public interest findings as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the National Policy."<sup>3</sup>

One year later, July 16, 1969, the Commission adopted rules which, in addition to forbidding discrimination on the basis of race, color, religion or national origin, also required that "equal opportunity in employment . . . be afforded by all licensees or permittees . . . to all qualified persons."<sup>4</sup> To meet this goal, licensees were required to

<sup>1</sup> *Report of the National Advisory Commission on Civil Disorders* (New York: Bantam Books, 1968).

<sup>2</sup> *Petition for Rulemaking to Request Licensees to Show Non-discrimination in Their Employment Practices*, 13 FCC 2d 766 (1968). ("(A) petition or complaint raising substantial issues of fact concerning discrimination in employment practices calls for full exploration by the Commission before the grant of the broadcast application before it.")

<sup>3</sup> *Id.* at 769.

<sup>4</sup> *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 FCC 2d 240 (1969). "Sex" was added as an impermissible basis for discrimination in May, 1970. *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 FCC 2d 430 (1970).

develop a program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice. On May 20, 1970, the Commission adopted rules requiring most of the licensees within its jurisdiction to file annual employment reports and a written equal employment opportunity program with certain application forms.

Just two years ago, we reiterated and clarified our policy on employment discrimination. We emphasized that our rules embodied the concepts of nondiscrimination and affirmative action, observing that:

An Affirmative Action Plan is a set of specific and result-oriented procedures which broadcasters must follow to assure that minorities and women are given equal and full consideration for job opportunities.<sup>5</sup>

In adopting the Model EEO Program proposed in 1975, the Commission noted that:

As we have moved with steadily increasing actions to strengthen our rules and policies in the area of non-discrimination in the employment policies and practices of broadcast station licensees, we have attempted to do so in line with our primary statutory mandate—the regulation of communication by wire and radio in the public interest. . . .

[W]e have sought to limit our rule to that of assuring on an overall basis that stations are engaging in employment practices which are compatible with their responsibilities in the field of public service broadcasting.<sup>6</sup>

<sup>5</sup> *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 FCC 2d 354, 358 (1975).

<sup>6</sup> *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226, 229-230 (1976).

The Supreme Court has spoken favorably of such Commission actions. In *NAACP v FPC*, 425 US 662, 670 n. 7 (1976) the Court observed:

The Federal Communications Commission has adopted regulations dealing with the employment practices of its regulatees. . . . These regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups.

The Commission has taken action on other fronts as well to assure that the needs, interests and problems of a licensee's community (including minorities within that community) are both ascertained and treated in the programming of the licensee. Under our ascertainment requirements<sup>7</sup> licensees are required to contact community leaders and members of the general public to obtain information about community interests and to present programming responsive to those interests. To aid licensees in these efforts, we have developed a community leader checklist consisting of 20 groupings or institutions which we believe are found in most communities. Reflecting our commitment to the expression of minority viewpoints, we have required that licensees specifically contact minorities in a community as a distinct grouping or institution (among the 20 groupings outlined by the Commission) from which representative leaders are to be drawn. Moreover, the Commission requires that the licensee interview minorities and women within the 19 "non-minority" institutions or groupings which it also expects the licensee to contact as part of its ascertainment procedure.

While the broadcasting industry has on the whole responded positively to its ascertainment obligations and has

<sup>7</sup> *Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC 2d 418 (1976).

made significant strides in its employment practices, we are compelled to observe that the views of racial minorities<sup>8</sup> continue to be inadequately represented in the broadcast media.<sup>9</sup> This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.

Thus, despite the importance of our equal employment opportunity rules and ascertainment policies in assuring diversity of programming it appears that additional measures are necessary and appropriate. In this regard, the Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming.

As the Commission's *Minority Ownership Task Force Report* recounts:

Despite the fact that minorities constitute approximately 20 percent of the population, they control fewer than *one percent* of the 8,500 commercial radio and television stations currently operating in this country. Acute underrepresentation of minorities among the owners of broadcast properties is troublesome in that it is the licensee who is ultimately re-

<sup>8</sup> For purposes of this statement, minorities include those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction.

<sup>9</sup> See *Federal Communications Commission's Minority Ownership Task Force, Minority Ownership Report* (1978); *U.S. Commission on Civil Rights, Window Dressing on the Set* (1977); See also *The Kerner Report*, *supra* at 207, 208, 210.

sponsible for identifying and serving the needs and interests of his audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved, and the larger non-minority audience will be deprived of the views of minorities.<sup>10</sup>

It is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum. And, of course, we have long been committed to the concept of diversity of control because "diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities."<sup>11</sup> What is more, affecting programming by means of increased minority ownership—as is also the case both with respect to our equal employment opportunity and ascertainment policies—avoids direct government intrusion into programming decisions.

Hence, the present lack of minority representation in the ownership of broadcast properties is a concern to us. We believe that diversification in the areas of programming and ownership—legitimate public interest objectives of this Commission—can be more fully developed through our encouragement of minority ownership of broadcast properties. In this regard, the Commission is aware of and relies upon court pronouncements on this subject.

<sup>10</sup> *Minority Ownership Report, supra.*

<sup>11</sup> *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965).

The United States Court of Appeals for the District of Columbia observed in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971):

Since one very significant aspect of the 'public interest, convenience, and necessity' is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.

\* \* \*

As new interest groups and hitherto silent minorities emerge in our society, they should be given the same stake in the chance to broadcast on our radio and television frequencies.<sup>12</sup>

In *TV 9 Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974), the Court again dealt with the issue of minority ownership. In reversing a decision where the Commission had refused to award merit to an applicant in a comparative proceeding based upon minority ownership and participation the Court emphasized:

It is consistent with the primary objective of *maximum diversification of ownership of mass communications media* for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token but in good faith, as broadening community representation, gives a local minority group media entrepreneurship. . . .

We hold only that when minority ownership is likely to *increase diversity of content*, especially on opinion and viewpoint, merit should be awarded.

<sup>12</sup> 447 F.2d at 1213 n. 36.

\* \* \*

The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news.<sup>13</sup>

The Court made plain that minority ownership and participation in station management is in the public interest both because it would inevitably increase the diversification of control of the media and because it could be expected to increase the diversity of program content.<sup>14</sup>

The Commission has acted in accordance with these judicial expressions. Its Administrative Law Judges have afforded comparative merit to applicants for construction permits where minority owners were to participate in the operation of the station.<sup>15</sup> The Commission itself has ordered the expedited processing of several applications filed by applicants with significant minority ownership interests.<sup>16</sup>

<sup>13</sup> 495 F.2d at 937-38 (emphasis added).

<sup>14</sup> As the Court observed in a subsequent opinion: "The entire thrust of *TV 9* is that Black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that reasonable expectation without 'advance demonstration' gives them relevance." *Garrett v. FCC*, 168 U.S. App. D.C. 266, 273, 513 F.2d 1056, 1063 (1975), 1056, 1063 (D.C. Cir. 1975) (footnote omitted).

<sup>15</sup> *Berryville Broadcasting Co.*, Docket 21185, FCC 78D-16 (1978); *Roseman Broadcasting Co., Inc.*, Docket Nos. 19887-8, 54 FCC 2d 394 (1976); *Robert M. Zitter and Hillary E. Zitter*, Docket 20243, FCC 75D-43 (1975).

<sup>16</sup> *Atlass Communications, Inc. (WJPC)*, 61 FCC 2d 995 (1976); *Hagadone Capital Corporation*, FCC 78-123, 42 P&F Radio Reg. 2d 632

Nevertheless, the continuation of an extreme disparity between the representation of minorities in our population and in the broadcasting industry requires further Commission action.<sup>17</sup> Accordingly, in issuing this statement of policy, we today endorse our commitment to increasing significantly minority ownership of broadcast facilities.

To implement our policy we initiate the first of several steps we expect to consider in fostering the growth of minority ownership.

In conjunction with our customary examination of assignment and transfer applications,<sup>18</sup> we intend to examine such applications where a sale is proposed to parties with a significant minority interest to determine whether there is a substantial likelihood that diversity of programming will be increased. In such circumstances, we will make use of our authority to grant tax certificates<sup>19</sup> to the assignors or transferors where we find it appropriate to advance

(1978); *Letter to Messrs. L. Glaser and Francis E. Fletcher, Jr.* FCC 78-167, adopted February 22, 1978; *Letter to Ken Goodman*, FCC 78-279, adopted April 20, 1978; *Letter to Terry E. Tyler*, FCC 78-280, adopted April 20, 1978.

<sup>17</sup> For a general treatment of the growth of Black-owned radio, see *Bachman, Dynamics of Black Radio*, (1977).

<sup>18</sup> See Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. §310(b).

<sup>19</sup> Under 26 U.S.C.A. Section 1017, the Commission can permit sellers of broadcast properties to defer capital gains taxation on a sale whenever it is deemed "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations. . . ." Originally tax certification was used to remove the hardship of involuntary transfer as a result of divestiture imposed by the Commission's multiple ownership rules. Now, however, tax certificates are routinely approved in voluntary sales as an incentive to licensees to divest themselves of communications properties grandfathered under the multiple ownership rules. *Issuance of Tax Certificates*, 19 P&F Radio Reg. 2d 1831 (1970).

our policy of increasing minority ownership.<sup>20</sup> A similar proposal was advanced to us by the National Association of Broadcasters and has won the endorsement of, among others, the Carter Administration, the American Broadcasting Companies, General Electric Broadcasting Company and the National Black Media Coalition.

Moreover, in order to further encourage broadcasters to seek out minority purchasers, we will permit licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basis qualification issues, but before the hearing is initiated, to transfer or assign their licenses at a "distress sale" price<sup>21</sup> to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other qualifications.

While we normally permit distress sales when the licensee is either bankrupt or physically or mentally disabled, there is precedent for such sales based on other grounds. See e.g. *Radio San Juan*, 29 P&F Radio Reg. 2d 607 (1974). The avoidance of time consuming and expensive hearings will more than compensate for any diminution in the license revocation process as a deterrent to wrongdoing. We contemplate grants of distress sales in circumstances similar to those now obtaining except that the minority ownership interests in the prospective purchaser will be a significant factor. The parties involved in

<sup>20</sup> We currently contemplate issuing a certificate where minority ownership is in excess of 50% or controlling. Whether certificates would be granted in other cases will depend on whether minority involvement is significant enough to justify the certificate in light of the purpose of the policy announced herein.

<sup>21</sup> In order to provide incentive for broadcasters opting for this approach, we would expect that the distress price would be somewhat greater than the value of the unlicensed equipment, which could be realized even in the event of revocation. See *Second Thursday Corporation*, 22 FCC 2d 515 (1970) recon. granted 25 FCC 2d 112 (1970); *Northwestern Broadcasting Corporation (WLTH)*, 65 FCC 2d 66 (1977).

each proposed transaction will be expected to demonstrate to us how the sale would further the goals on which we are today basing the extension of our distress sale policy. All such transactions will be scrutinized closely to avoid abuses.

The Congressional Black Caucus has petitioned for rule-making to permit distress sales to minorities. While we endorse the goal of such a proposal we have concluded that cases should be reviewed as they arise to determine that the objectives of our policies will be met. Consequently, for the present a rigid rule on such sales will not be adopted.

Applications by parties seeking relief under our tax certificate and distress sale policies can be expected to receive expeditious processing.

We are keenly aware that the first steps we announce today do not approach a total solution to the acute underrepresentation problem. They are made possible because proposals raising these issues have been submitted to us and these proposals, the collective comments received thereon, and the findings of our Minority Ownership Task Force provide us with a compelling record upon which to base our action.

Beyond the steps taken today, we intend to examine, among other things, the recommendations set forth in the *Minority Ownership Report*. Also, while the immediate area of concern of this statement has been broadcasting, it is expected that in the future attention will also be directed towards improving minority participation in such services as cable television and common carrier. Finally, as was concluded in our *Minority Ownership Report*, if the goal of significant minority ownership is to be reached, Congress, other governmental agencies, and the private sector

must join in these efforts. We welcome petitions for rule-making or other submissions from concerned parties as to other actions we might take to reach our objectives.<sup>22</sup>

Action by the Commission May 17, 1978. Commissioners Ferris (Chairman), Lee, Quello, Washburn, Fogarty, White and Brown.

FEDERAL COMMUNICATIONS COMMISSION

<sup>22</sup> For example, while today's actions are limited to minority ownership because of the weight of the evidence on this issue, other clearly definable groups, such as women, may be able to demonstrate that they are eligible for similar treatment.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
September Term 1988

No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION  
ASTROLINE COMMUNICATIONS CO.,  
*Intervenor*

APPEAL FROM AN ORDER OF THE FEDERAL  
COMMUNICATIONS COMMISSION

Before: WALD, Chief Judge, SILBERMAN, Circuit Judge,  
and MacKINNON, Senior Circuit Judge

JUDGMENT

This cause came on to be heard on the record on appeal of an order of the Federal Communications Commission and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the order under review is vacated and the case remanded for further proceedings, in accordance with the Opinion of the Court filed herein this date.

*Per Curiam*

FOR THE COURT:

/s/ Constance L. Dupré  
CONSTANCE L. DUPRE, CLERK

Date: March 31, 1989

Opinion Per Curiam.

Separate opinion filed by Circuit Judge Silberman.

Separate opinion filed by Senior Circuit Judge MacKinnon.

Dissenting opinion filed by Chief Judge Wald.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Issued June 16, 1989

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No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

ASTROLINE COMMUNICATIONS CO., INTERVENOR

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Appeal from an Order of the  
Federal Communications Commission

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## ON PETITIONS FOR REHEARING

Before: WALD, *Chief Judge*, SILBERMAN, *Circuit Judge*  
MACKINNON, *Senior Circuit Judge*

## ORDER

Upon consideration of the petitions for rehearing of  
appellee and intervenor it is

Bills of costs must be filed within 14 days after entry of judgment. The  
court looks with disfavor upon motions to file bills of costs out of time.

ORDERED, by the Court, that the petitions are denied.

*Per Curiam*

FOR THE COURT:

CONSTANCE L. DUPRE  
Clerk

Chief Judge Wald would grant the petitions for rehearing.

A statement of Senior Circuit Judge MacKinnon is attached.

MACKINNON, *Senior Circuit Judge*: I vote to deny rehearing by the panel and the suggestion for rehearing *en banc* for the reasons set forth below.

From existing decisional law it must be concluded that any racial or group preference is inherently suspect, must be subject to close and careful scrutiny and can only be upheld to justify an award to promote programming diversity if it is one of several factors that entered into the decision. *J.A. Croson Co. v. City of Richmond*, 109 S. Ct. 706, 721 (O'Connor, J.), at 735 (Scalia, J.) (1989). In other words, racial or group preference violates equal protection if, as here, it is the only basis for a federal agency preferring one applicant over another. As Justice Powell stated in his opinion, *University of California Regents v. Bakke*, 438 U.S. 265 (1978):

[P]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the constitution forbids.

*Bakke* at 307 (Powell, J.). Cf. *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987) (Title VII analysis).

The standards of the Federal Communications Commission's distress sale policy here in question provide that certain minority groups shall have an absolute preference over all other citizens in qualifying for a broadcast license that is designated for hearing. The preferred minority groups are defined and restricted to those who are:

[B]lack, Hispanic surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction, 68 FCC2d at 781 n.8 (1978).

Even all non-minority women are excluded. The preferred group in this case is: "Hispanic surnamed." With all the intermarriages, having a Hispanic surname

is no guarantee that a person is "Hispanic" or a minority to any substantial degree—though this opinion makes nothing of this point. In my opinion there is no possibility that an *absolute* group preference can be held to be constitutional under the equal protection standard implicit in the 5th Amendment.<sup>1</sup> *Bolling v. Sharpe*, 347 U.S. 417 (1954).

<sup>1</sup> The dissent cites Justice Scalia's statement in his concurring opinion in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) which notes that Congress, pursuant to Section 5 of the 14th Amendment, possess augmented legislative powers "concerning matters of race." Statement of dissent denying rehearing *en banc* at 1, *Shurberg Broadcasting of Hartford, Inc. v. Federal Communications Commission*, No. 84-1600 (quoting *City of Richmond v. J.A. Croson Co.*, *supra*, Scalia, J. at 736). This citation implies that Congress, by virtue of Section 5 of the 14th Amendment, has augmented legislative powers which extend beyond the power to enact race conscious legislation to remedy prior group discrimination, and extend to authorize legislation designed to promote diversity. In this respect the dissent is troubling for the far reaching consequences it may sow. Clearly, the *Croson* decision does not warrant such an assumption. In *Croson*, the Court considered Richmond's affirmative action program which was designed to remedy prior racial discrimination in the City. *Croson* at 713; at 735 (Scalia, J.). Justice Scalia's reference to the Congress' "enhanced powers" under Section 5 of the 14th Amendment must be interpreted as addressing legislation designed to *remedy* prior discrimination. Similarly, Chief Justice Burger's opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), outlined Congress' powers under the 14th Amendment in the context of legislation designed to remedy prior racial discrimination:

Here we deal, as we noted earlier, not with the *limited remedial powers* of a federal court, for example, but with the *broad remedial powers* of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive *remedial power* than in Congress, expressly charged by the Constitution with the competence and authority to enforce equal protection guarantees.

*Fullilove* at 483 (Burger, C.J.) (emphasis added). The dissent seeks, without discussion or citations to authority, to

With the case in its present posture nothing would be gained by rehearing. The Commission has been absolutely prohibited by Congress from making any change or even determining the facts to justify the validity of the program. In addition, the Commission has vacillated from one position to another like a teeter-totter and when it filed its opinion in this case was in one of its 2 to 1 reversal moods due to two unfilled Commission vacancies. These two Commissioners stated that the program is constitutional. However, the Commission's earlier brief to the *en banc* court in *Steel v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated and rehearing en banc granted*, Order of October 31, 1985, *remanded*, Order of October 9, 1986 (FCC Brief at 15), stated that the Commission's racial and gender preference policies, which would include the distress sale program, were unconstitutional. The Commission's *Steel* Brief on Rehearing En Banc stated:

rely on Section 5 of the 14th Amendment as a positive grant of legislative power enabling Congress to enact race conscious programs designed to promote diversity absent any evidence of prior racial discrimination.

The implied assertion of the dissent that a legislative objective other than the remedying of past discrimination is entitled to heightened deference pursuant to Section 5 of the 14th Amendment is alarming because it has no logical stopping point. Judge Silberman has also expressed doubts as to whether Congress is entitled to enhanced deference under the 14th Amendment outside the remedial context. Silberman at 43. Moreover, a plurality of the Supreme Court stated that race conscious programs should be "strictly reserved for remedial settings." *Croson* at 721 (O'Connor, J.); at 736 (Scalia, J.); see Silberman at 36. To accord Congress heightened deference under the 14th Amendment outside remedial settings would grant the Legislative Branch a broad license to classify citizens on the basis of race pursuant to the Amendment designed to do away with such racial classification. Of course, this case is limited by the 5th Amendment, but some degree of "equal protection" must still be satisfied.—I fail to see that an *absolute* preference can be upheld under the equal protection implications of the 5th Amendment.

# I. THE FCC'S CURRENT POLICY OF GRANTING RACE AND GENDER PREFERENCES CONFLICTS WITH CONSTITUTIONAL STANDARDS.

The racial and gender preference policies employed by the FCC in comparative licensing proceedings since 1978 are discriminatory classifications by government that are inherently suspect, presumptively invalid and subject to stringent scrutiny under the equal protection guarantee implicit in the due process clause of the Fifth Amendment. See *Wygant v. Jackson Bd. of Educ.*, 90 L.Ed.2d 260, 268 (1986); *Lehr v. Robertson*, 463 U.S. 248, 265-66 (1983).

Properly balanced programming diversity of viewpoint in mass media is an acceptable goal, but the Commission in its long history of awarding broadcast licenses has never thwarted that objective by unconstitutionally discriminating against minorities. The objective of programming diversity, whether considered as satisfying the 5th Amendment or as authorized by the 14th Amendment must meet some modicum of *equal* protection.

The dissent states at n.3 that if this case was reheard "on the merits" by the court *en banc* and the court was equally divided the FCC's decision would be upheld. I fail to understand the significance of this speculation. As the court is presently constituted, *en banc* consideration of this case would not ordinarily result in an equally divided court. The *en banc* court would include the senior circuit judge who participated in the original panel, which, based on positions presently expressed, would result in a 6-5 vote affirming the reasoning of the majority decision of the panel. See *Boeing Company v. Shipman*, 411 F.2d 365, 367 (5th Cir. 1969); *Luna v. Beto*, 395 F.2d 35, 37 (5th Cir. 1968); *Allen v. Johnson*, 391 F.2d 527 (5th Cir. 1968); cf. *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) (*En Banc*) (two Senior Circuit Judges participating in rehearing *en banc* due to their

participation in the original three judge panel.). Thus, only delay would be the most likely result from granting rehearing *en banc*.

Dennis R. Patrick, as Chairman of the Federal Communications Commission, in his dissenting opinion, has set forth the material facts and the law in an admirable opinion. The dissent would denigrate the soundness of the Chairman's opinion because he has subsequently resigned. The soundness of a legal decision is not diminished by the resignation or death of an official. Chief Justice Marshall's opinions and those of all prior judges still survive as precedents. The evaluation of the legal reasoning in Chairman Patrick's dissent is entitled to be evaluated on the basis of its legal merits to the same extent as the dissent in this case. Because Chairman Patrick's excellent opinion succinctly covers the entire background and the law applicable to each phase of this case, it deserves more recognition than it has received, and, so far as relevant, is set forth in the following Appendix.<sup>2</sup>

<sup>2</sup> The fact that Chairman Patrick favored rehearing *en banc* in this case and *Winter Park* was not stated because it is not relevant here. He supported rehearing *en banc* for *Shurberg* only if *Winter Park* was included. However, *Winter Park* is distinguishable on two material grounds. It involved (1) a comparative hearing and (2) the minority preference was only a *plus factor*. In *Shurberg* minority preference is an *absolute preference*. This case is not to be contrasted with a case which involved race as only one factor in a comparative licensing procedure.

## APPENDIX

DISSENTING OPINION OF CHAIRMAN PATRICK  
OF THE FEDERAL COMMUNICATIONS COMMISSION  
IN *SHURBERG*.

\* \* \*

The Commission's minority preference policies have a tortured past. The Commission initially took the position that minority preference should be granted only after the minority applicant clearly demonstrated that program and viewpoint diversity would be fostered through minority ownership. After being directed by the D.C. Circuit to presume a nexus between minority ownership and program diversity,<sup>1</sup> the Commission developed various preferences designed to promote minority ownership, including the distress sale policy at issue in *Shurberg*, the comparative preference policy and the tax certificate policy. See *Policy Statement on minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 (1978). The Commission later extended the comparative preference policy to females. See *Mid-Florida Television Corp.*, 69 F.C.C. 2d 607, 652 (1978). The constitutionality of that policy was challenged in *Steel v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated and rehearing en banc granted*, Order of Oct. 31, 1985, *remanded* Order of Oct. 9, 1986. At that point, the Commission believed that "both the gender and racial preference schemes conflict with equal protection standards under the Constitution." Supplemental Brief for the Federal Communications Commission at 13, *Steele v. FCC*, No. 84-1176 (D.C. Cir.). The Commission unanimously concluded, based on recent Supreme Court decisions applying equal protection analysis, that racial classifications may not be based on the assumption alone, without a factual predicate, that integrated minority owners will result in increased programming and viewpoint

<sup>1</sup> *TV 9, Inc. v. FCC*, 495 F.2d 939 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

diversity. *Id.* As a result the Commission urged the court to permit us to undertake a comprehensive inquiry into the legal and factual predicate of our preference policies to determine whether a nexus truly does exist between minority ownership and program diversity. The Commission thereafter undertook such a study designed to provide a fuller record and to gather the empirical data necessary to support retention of our preference scheme. *Notice of Inquiry* in MM Docket No. 86-784, FCC 86-549, 1 FCC Rcd. 1315 (1986). Prior to the completion of this study, however, Congress decreed that the FCC expend no funds in fiscal year 1988 to complete its research or to change its preference policies.<sup>2</sup> In compliance with this congressional mandate, the Commission closed its rulemaking, without issuing any findings or conclusions, and reestablished all preference policies.

In *Shurberg*, each of the three separate opinions treats *West Michigan* differently. Judge Silberman questions *West Michigan*'s initial conclusion that there is a compelling government interest in increasing diversity of programming and goes on to conclude that it may, in any event, be undermined by the Supreme Court's recent decision in *Croson*. Judge MacKinnon's opinion does not address *West Michigan per se* but insists that preference policies must be narrowly tailored, while Judge Wald concludes that at least some of the conclusions in *West Michigan* have not been undermined by subsequent Supreme Court decisions.

<sup>2</sup> See *Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-202 (signed Dec. 22, 1987). The appropriations legislation prohibits the Commission from using funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" the Commission's policies premised on racial, ethnic or gender classification, except to: (1) close its proceeding investigating the preference policies; (2) reinstate prior policy; and (3) lift any suspension imposed on implementing the policies pending its investigation.

Recent Supreme Court precedents collectively make clear that racial and gender classifications are inherently suspect and will be subject to close and careful scrutiny.<sup>3</sup> Most significantly, after *Croson*, the standard of review required for any governmental classification based on race is strict scrutiny. *City of Richmond v. J.A. Croson Co.*, 57 U.S.L.W. 4132, 4139 (Part III-A) and 4146 (Scalia, J. concurring).

The first stage of equal protection analysis under strict scrutiny requires a determination as to whether there is a compelling government objective. The Supreme Court has only identified two compelling interests for race-based policies. First, such minority preference policies may be implemented to remedy past discrimination. *Fullilove*, 448 U.S. at 475.<sup>4</sup> Second, at least Justice Powell in *Bakke* believed that, for educational institutions, academic diversity is a compelling government interest.<sup>5</sup> *Bakke*, 438 U.S. at 311-15 (opinion of Powell, J.).

<sup>3</sup> See e.g., *City of Richmond v. J.A. Croson Co.*, 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989); *Wygant v. Jackson Board of Education*, 90 L.Ed.2d 260 (1986); *Fullilove v. Klutznik*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). See also *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

<sup>4</sup> The Commission has never claimed that its preference policies are intended to remedy prior discrimination against minorities or to provide remedial benefits. It could be argued that Congress has separately adopted our policies as its own, with the justification that its policies are remedial. But Congress did not justify its funding decisions remedial. As my fellow Commissioners agree, Congress relied solely on a diversity rationale. FCC Petition for Rehearing at n.1.

<sup>5</sup> It is unclear after *Croson* whether Justice Powell's diversity rationale would be endorsed by the present Court. A plurality of the Court in that case quite clearly stated that classifications based on race should be "strictly reserved for remedial settings." *Croson*, 57 U.S.L.W. at 4139, see also *id.* at 4145 (Scalia, J., concurring). And Justice O'Connor, who had indicated some sympathy for Justice Powell's diversity

From this second justification, the D.C. Circuit in *West Michigan* extrapolated to find "program diversity" in broadcasting a compelling interest. This premise, set out in *West Michigan*, relies on Justice Powell's opinion in *Bakke* that a diverse educational environment is a compelling goal that may be constitutionally promoted by certain admissions policies which recognize race as one of several factors. As racial diversity is only one aspect of a truly diverse student body, Justice Powell believed that a university could use race as one factor in a multi-factor admissions decision.<sup>6</sup>

Similarly, if one assume program diversity to be a compelling goal, race is but one factor which may bear on diversity of viewpoint.<sup>7</sup> Because minority status is the

rationale, *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring), appears to have rejected that rationale in *Croson*. Justice Stevens interpreted Justice O'Connor's opinion as such a rejection, *Croson*, 57 U.S.L.W. at 4144 n.1 (Stevens, J., concurring in part), as has Judge Silberman, *Shurberg*, Silberman opin. at 35-39. While Judge Wald agrees as to the substance of Justice Stevens' interpretation of the O'Connor opinion, *Shurberg*, Wald opin. at 18 n.20 (dissenting), she herself would read that same opinion differently. With all due respect to Judge Wald, I must defer to the interpretation of *Croson* rendered by a member of the Supreme Court. Thus, in light of the Court's decision in *Croson*, whether the academic diversity rationale remains as a compelling government interest for race-based policies is an open question. Certainly then, extensions of that rationale cannot be supported.

<sup>6</sup> The plan before the *Bakke* court, [sic] however, employed a racial set-aside, which did not account for other diversity factors. As Justice Powell wrote in *Bakke*, "preferring members of any one group for no reason other than race or ethnic [sic] origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307. The Court thus struck that plan down as unconstitutional.

<sup>7</sup> As I have previously noted, however, the Commission has been prohibited from determining whether race is a factor in viewpoint diversity, that is, whether there is a nexus between minority ownership and programming.

exclusive criterion for use of the distress sale policy, I fail to see why that policy passes even Justice Powell's test. Outside the remedial context, the Supreme Court has *never* upheld a preference policy based solely on race, and has specifically rejected the use of minority set-asides as a means of promoting diversity. *Bakke*, 438 U.S. at 314-18.

Citing *Fullilove*, my fellow Commissioners see no reason why the court should not extend its findings in the remedial context to the diversity arena. I submit that one does not necessarily lead to the other. It is clear after the Supreme Court's decision in *Croson* that race-based measures are subject to the highest degree of scrutiny. Where evidence of past discrimination exists, the Court may well tolerate race-based *remedial* measures. But where the most nebulous goal of diversity is at issue, the most that even Justice Powell would permit is the consideration of race as one of several factors. There is no basis to think the Court would allow more.

Ensuring that minority perspectives can be aired in a diverse broadcast marketplace is an important policy goal which I support. But our station licensing and transfer policies must, above all else, guarantee equal protection of the laws to all Americans. As such, our race-conscious policies must be subjected to the most rigorous review to insure fidelity to this principle.

. . . .

## United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Issued June 16, 1989

No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

ASTROLINE COMMUNICATIONS CO., INTERVENOR

Appeal from an Order of the  
Federal Communications Commission

### ON SUGGESTIONS FOR REHEARING *EN BANC*

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE,  
*Circuit Judges*

### ORDER

The suggestions for rehearing *en banc* of appellee and intervenor have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of either suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

FOR THE COURT:

CONSTANCE L. DUPRE  
Clerk

Chief Judge Wald and Circuit Judges Robinson, Mikva, Edwards and Ruth B. Ginsburg would grant the suggestions.

A statement of Chief Judge Wald, joined by Circuit Judges Robinson, Mikva, Edwards and Ruth B. Ginsburg, is attached.

Former Circuit Judge Starr did not participate in this matter while a member of the Court.

WALD, *Chief Judge*, joined by ROBINSON, MIKVA, EDWARDS and RUTH B. GINSBURG, *Circuit Judges*, dissenting from denial of rehearing *en banc*: My dissent from the panel's disposition of this case sets forth my reasons for concluding that the distress sale policy is a constitutional exercise of congressional power. For several reasons, I regard this case as sufficiently important to warrant *en banc* reconsideration.

First, the continued use of the distress sale policy has been mandated by an Act of Congress. The panel opinions in this case rely heavily on the Supreme Court's decisions in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) and *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989), both of which involved affirmative plans initiated by local authorities. Of the six Justices who comprised the *Croson* majority, however, four drew an express distinction between the expansive powers of Congress and the more limited powers of state and local governments. See 109 S. Ct. at 719 (Opinion of O'Connor, J.) ("That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate"); *id.* at 736 (Scalia, J., concurring) ("[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1"). *Croson* certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences. In fact, the *Croson* Court's curtailment of state and local affirmative action programs makes the issue of congressional authority all the more important. This issue alone merits *en banc* review.

Second, the agency itself, despite its prior misgivings, has now indicated clearly that it supports the distress sale policy—a fact which was not free from doubt at the time of the panel's decision.<sup>1</sup> Portions of the panel opinions also cast doubt upon other FCC policies designed to increase minority participation in broadcast ownership as a means of enhancing programming diversity. These policies include the consideration of race as one element in comparative licensing procedures—a

<sup>1</sup> Judge MacKinnon attaches great significance to the fact that the agency's decision to seek rehearing was made by a 2-1 vote. My colleague provides lengthy excerpts from FCC Chairman Dennis Patrick's dissent from the Commission's position to petition for *en banc* review. Since Chairman Patrick was the lone dissenter, and since he has resigned from his post on the Commission, effective upon the appointment of his successor, his views are hardly the best indicator of the agency's current position.

Moreover, Chairman Patrick's opposition to rehearing of this case was hardly unequivocal. The Chairman stated:

In light of the importance and complexity of these issues, particularly given recent Congressional actions and the varying opinions in *Shurberg* and [*Winter Park Communications, Inc. v. FCC*, No. 88-1755 (D.C. Cir. April 21, 1989)], I would petition the D.C. Circuit to hear *Shurberg en banc* and support a petition for rehearing on *Winter Park*. Both cases could be considered together and the court could give us definitive guidance. But I cannot support my fellow Commissioners' approach of requesting only partial enlightenment in this area.

Dissenting Statement of Chairman Dennis R. Patrick at 3.

Nor do the agency's recent doubts concerning the distress sale policy impugn the Commission's current support. After all, the FCC's prior enforcement of the fairness doctrine did not invalidate its recent decision that the doctrine should be repealed. See *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). The Commission's prior doubts simply reflect the fact that this is a complex and difficult area of the law—hardly an argument against *en banc* review.

practice only recently reaffirmed by this Court in *Winter Park*. Substantial uncertainty now exists concerning the scope of the Commission's authority to consider race in its licensing decisions. *En banc* rehearing is especially desirable in view of the fact that this court is the exclusive forum for review of the FCC's licensing policies.

Finally, the panel's disposition of this case creates considerable doubt as to whether the pursuit of diversity remains a viable justification for affirmative action programs in *any* setting. This aspect of the panel opinions has constitutional ramifications stretching well beyond the broadcasting context; clearly it calls into question the constitutionality of affirmative action programs in student admissions at public universities.<sup>2</sup> A decision with such sweeping implications is surely an appropriate subject of *en banc* reconsideration.

<sup>2</sup> The original panel produced three different views on this issue. Judge Silberman expressed doubt as to whether the diversity rationale for racial preferences remains viable in light of *Croson*, even in the context of higher education. See Silberman op. at 35-36. Judge MacKinnon declined to reach the question. See MacKinnon op. at 8 n.11. I expressed the view that the pursuit of diversity is a sufficiently important interest to justify the use of racial preferences. See Wald op. at 16-18. Certainly the panel opinions do not foreclose all diversity-based plans in other contexts, but they are likely to spawn considerable uncertainty and confusion among public administrators in a wide range of settings—most notably in education.

Moreover, all nine Justices in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), concluded that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, imposes restrictions at least as severe as those established by the Constitution. See *Bakke*, 438 U.S. at 286-87 (Opinion of Powell, J.); *id.* at 328-40 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.); *id.* at 416 (Opinion of Stevens, J.). If public university admissions programs which take account of race are constitutionally proscribed, that proscription would also apply to private universities receiving federal funds.

For the foregoing reasons, I dissent from the denial of rehearing *en banc*. The denial of review, by an equally divided court,<sup>3</sup> has the effect of invalidating a congressional enactment—as well as a longstanding, vigorously supported agency program—designed to address the dearth of minority voices within the nation's broadcast media. The Congress and the FCC deserve the consideration of the full court on such a serious matter.

<sup>3</sup> I would note that when an *en banc* court is equally divided on the merits, the decision of the agency is affirmed. See Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit at 68 (1987).

COMMUNICATIONS AMENDMENTS ACT OF 1982  
—NATIONAL TELECOMMUNICATIONS AND  
INFORMATION ADMINISTRATION

\* \* \*

RANDOM SELECTION SYSTEM FOR CERTAIN LICENSES AND  
PERMITS

\* \* \*

(c)(1) Section 309(i)(3)(A) of the Communications Act of 1934 (47 U.S.C. 309(i)(3)(A)) is amended by striking out “, groups” the first place it appears therein, and all that follows through the end thereof, and inserting in lieu thereof the following: “used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.”.

(2) Section 309(i)(3) of the Communications Act of 1934 (47 U.S.C. 309(i)(3)) is amended by adding at the end thereof the following new subparagraph:

“(C) For purposes of this paragraph:

“(i) The term ‘media of mass communications’ includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

"(ii) The term 'minority group' includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders."

\* \* \*

# CONTINUING APPROPRIATIONS, FISCAL YEAR 1988

\* \* \*

## FEDERAL COMMUNICATIONS COMMISSION SALARIES AND EXPENSES

\* \* \*

\* \* \* *Provided*, That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d 1313 (1982) and Mid-Florida Television Corp., 60 F.C.C. 2d 607 Rev. Bd. (1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry: \* \* \*

\* \* \*

## DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY AND RELATED AGENCIES APPROPRIATION ACT, 1989

\* \* \*

## FEDERAL COMMUNICATIONS COMMISSION SALARIES AND EXPENSES

\* \* \*

\* \* \* *Provided*, That none of the funds appropriated by this act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in the Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d 1313 (1982) and Mid-Florida Television Corp., 60 F.C.C. 2d 607 Rev. Bd. (1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry: \* \* \*

\* \* \*

**CONSTITUTION OF THE UNITED STATES****Amendment I.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

\* \* \*

**Amendment V.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

\* \* \*

No. 89-700

2

Supreme Court, U.S.

FILED

DEC 5 1989

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*et al.,*

*Respondents.*

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The District Of Columbia Circuit

**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

Harry F. Cole,

*Counsel of Record*

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December 5, 1989

25 pp

## **PARTIES TO THE PROCEEDING**

Alan Shurberg, a long-time resident of Hartford, Connecticut, was the sole principal of Shurberg Broadcasting of Hartford, Inc. That corporation applied to the Federal Communications Commission ("FCC") in 1983 for authority to construct a broadcast station on Channel 18 in Hartford and initially prosecuted the appeal arising from the FCC's action relative to that application. Mr. Shurberg has, since February, 1989 and pursuant to the FCC's rules, prosecuted the application and the appeal as a sole proprietorship, *i.e.*, Alan Shurberg d/b/a Shurberg Broadcasting of Hartford. Mr. Shurberg, his sole proprietorship, and his corporation are referred to collectively as "Shurberg" herein.

Petitioner Astroline Communications Company Limited Partnership Debtor in Possession ("Astroline") is a Massachusetts Limited Partnership which has been in Chapter 11 bankruptcy proceedings in United States Bankruptcy Court for the District of Connecticut (Case No. 2-88-01124) since December 1988.

The Federal Communications Commission is an independent agency charged with regulating the radio airwaves in the United States.

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In The

**Supreme Court of the United States**

October Term, 1989

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 No. 89-700
 

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Astroline Communications Company  
Limited Partnership,  
*Petitioner,*

v.

Shurberg Broadcasting of Hartford, Inc.  
*et al.,*  
*Respondents.*

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**COUNTERSTATEMENT OF THE CASE**

Respondent Shurberg Broadcasting of Hartford opposes the petition for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. There is no reason for granting the petition and, in fact, Petitioner Astroline Communications Company Limited Partnership Debtor-in-Possession ("Astroline") does not in any event have the requisite standing to raise the issues which it seeks to present to this Court. The Petition contains no reference to *any* of the considerations for granting

certiorari set forth in Supreme Court Rule 17.1. Nor could Astroline demonstrate the presence of any of those considerations: notwithstanding Astroline's self-serving, materially incomplete, presentation to this Court, the decision below was clearly correct and in accord with decisions of this Court and the court below.

This case involves a single policy -- the minority distress sale policy ("distress sale policy") -- of the Federal Communications Commission ("FCC"). See *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978), clarified, 44 Rad. Reg. 2d (P&F) 479 (1978) (collectively, "1978 Policy Statement"); *Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982) ("1982 Policy Statement"). That policy was adopted, without formal rule making proceedings or the development of any supporting administrative record, in 1978. See *1978 Policy Statement, supra*; *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986) ("1986 Notice of Inquiry"). The policy was available only to members of various groups generally defined by the FCC as "minorities". It therefore completely excluded non-minorities such as Alan Shurberg, Shurberg's sole principal, strictly on the basis of race. The constitutionality of this race-based exclusory policy had not been challenged prior to this case.

Pursuant to well-established, statutorily-mandated policies, in 1983 Shurberg filed an application with the FCC seeking the facilities of Station WHCT-TV, Hartford, Connecticut. At that time WHCT-TV was licensed to

Faith Center, Inc. ("Faith Center"), and Shurberg was seeking the opportunity to compete for the license in a comparative renewal proceeding.<sup>1</sup> Despite Shurberg's best efforts, the FCC took no immediate action on Shurberg's application and, seven months after that application was filed, Faith Center sought to invoke the minority distress sale policy to avoid a comparative proceeding by selling the station to Astroline.

Shurberg opposed the Faith Center/Astroline distress sale application, arguing *inter alia* that: (1) approval of the proposed distress sale and rejection of Shurberg's application would be inconsistent with the Communications Act and the FCC's own express policies; (2) Astroline was not in fact a "minority-controlled" entity eligible to take advantage of the distress sale policy; and (3) that policy discriminated against non-minorities unconstitutionally on the basis of their race. The FCC rejected all of Shurberg's arguments and granted distress sale relief to Faith Center and Astroline.

Shurberg appealed that decision to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), preserving each of the arguments raised before the agency. Before the court below, the FCC initially

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<sup>1</sup> The comparative renewal process is mandated by the licensing provisions of the Communications Act of 1934, as amended ("Communications Act"), 47 U.S.C. §§1 *et seq.* See, e.g., *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); *Central Florida Enterprises v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). Shurberg sought comparative status equivalent to that which the FCC had granted similarly-situated parties in *Faith Center, Inc.*, 89 F.C.C.2d 1054 (1982).

defended the constitutionality of the distress sale policy. However, in September, 1986 – while the instant case was still pending – the FCC advised the full D.C. Circuit, sitting *en banc*, that, in light of intervening decisions of this Court in the area of reverse discrimination, the FCC had reviewed its minority ownership policies and determined that no adequate record had been compiled to support the constitutionality of those policies. Specifically, the FCC advised the court that

First, no record has been established demonstrating that a race- or gender-based preference scheme to increase minority and female ownership is essential to achieving th[e] objective [of expanding diversity of programming]. . . . Second, no record has been established on which to base an assumption that a nexus exists between an owner's race or gender and program diversity.

Brief of FCC on rehearing *en banc* in *Steele v. FCC*, No. 84-1176 (D.C. Cir.) (September 12, 1986), at 18. In sum, the FCC advised the full D.C. Circuit in *Steele* that

The Commission has closely examined the Commission's preference scheme . . . and concluded that it fails to pass constitutional muster as a tool to enhance diversity. . . .

*Id.*

The FCC restated that view with particular respect to the distress sale policy both to the panel below in the instant case, *see, e.g.*, Petitioner's Appendix at 11a, and in

its 1986 *Notice of Inquiry, supra*. Thus, as of December, 1986, the FCC's position was that no record had theretofore been developed adequate to support the constitutionality of the policy.<sup>2</sup> The FCC thus effectively conceded that the distress sale policy, as it was in effect when applied in this case in 1984, was unconstitutional. Not surprisingly, the court below similarly – and correctly – found the distress sale policy as applied in this case to be unconstitutional, without reaching Shurberg's non-constitutional claims or its arguments concerning Astroline's apparent non-minority nature.

In sum, the decision below was consistent not only with the decisions of this Court, but also with the views of the agency which had itself developed the policy in question. This case clearly does not merit this Court's time or attention, and the Petition should be denied.

#### REASONS WHY THE PETITION SHOULD BE DENIED

At no point in its lengthy Petition does Astroline refer to any of the reasons – clearly set forth in this Court's own Rules – for which certiorari might be granted. This is understandable, for none of those reasons is applicable to this case: the decision below is not in conflict with any

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<sup>2</sup> Shockingly, in its Petition Astroline fails to mention that the agency which promulgated the policy under review itself effectively conceded the unconstitutionality of that policy. The FCC has not sought review by this Court of the decision below, nor did it file a timely brief in support of Astroline's Petition. *See* Supreme Court Rule 19.6.

other court decision, is completely consistent with applicable decisions of this Court, and involves but a single, very limited policy of the FCC. *See* Supreme Court Rule 17.1. Indeed, Astroline cannot even legitimately claim that it has standing to challenge the constitutional conclusion of the court below.

## I.

**ASTROLINE IS NOT A MINORITY-  
CONTROLLED ENTITY WITH STANDING TO  
SEEK REVERSAL OF THE DECISION BELOW  
ON CONSTITUTIONAL GROUNDS.**

This Court's "prudential standing rule" bars litigants from "asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, 422 U.S. 490, 509 (1975). The question of standing goes to the Court's jurisdiction, *see Flast v. Cohen*, 392 U.S. 83, 94-101 (1968), and must be considered as a threshold matter.<sup>3</sup>

Astroline's Petition is premised on the notion that the distress sale policy was an appropriate mechanism for the advancement of the interests of "minority" group members. Astroline's claim to standing thus appears to be based on the notion that Astroline is itself a minority-controlled entity adversely affected by the determination below that the distress sale policy is unconstitutional reverse

<sup>3</sup> This is true even where the lower court(s) passed over without comment questions possibly affecting standing. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

discrimination. But contrary to Astroline's assertions, the available record demonstrates that Astroline is not, in fact, a minority-controlled entity.

Astroline is a limited partnership supposedly controlled by Richard Ramirez, a supposedly Hispanic individual.<sup>4</sup> Mr. Ramirez' supposed controlling position is the sole basis for Astroline's claim of being a "minority-controlled" entity. But Astroline's own records, submitted to the Secretary of Commonwealth of Massachusetts (the state in which Astroline was formed) reveal that, of the total of more than \$24,000,000 in capital contributions made by Astroline's various partners, Mr. Ramirez contributed a total of \$210. That is, Mr. Ramirez' capital contribution represents less than one one-thousandth of one percent (0.001%) of Astroline's capital. Moreover, Astroline's partnership agreement did not provide for non-

<sup>4</sup> Astroline asserted simply that Mr. Ramirez is Hispanic; the FCC accepted that assertion without inquiring into the basis for it. Astroline has not claimed that Mr. Ramirez has ever been the victim of discrimination. *See* Concurring Opinion of Judge Silberman, Petitioner's Appendix at 31a ("[T]here was no procedural mechanism that would allow Shurberg . . . to prompt an inquiry into the economic status or the source of any disadvantage of Ramirez or his forebearers, nor did the FCC undertake any such investigation on its own initiative.").

capital contributions (such as "sweat equity").<sup>5</sup>

In view of the dramatic disparity between the negligible actual contribution by Mr. Ramirez, on the one hand, and Astroline's claim of minority control, on the other, that claim cannot legitimately be credited unless the Court is willing to hold, as a matter of law, that an entity may be deemed to be "minority-controlled", for constitutional purposes, solely on the basis of a minority person's investment of less than one one-thousandth of one percent (*i.e.*, less than one one hundred thousandth) of the entity's capital.<sup>6</sup>

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<sup>5</sup> Shurberg has consistently argued, before the court below and the FCC, that Astroline is not a bona fide "minority-controlled" entity. The FCC rejected Shurberg's arguments and the court below did not have occasion to address them. At no time has Astroline disputed Shurberg's assertions concerning the *de minimis* nature of Mr. Ramirez' contribution. Since late 1988, Astroline has been the subject of an on-going bankruptcy proceeding. In that proceeding, further evidence has been adduced by the creditors tending to confirm Shurberg's long-held position that Mr. Ramirez did not in fact wield any control over Astroline's affairs. While that information has been presented to the FCC for its consideration, it is not part of the record below and is not relied on here. That information would have to be considered, however, before any credence could be given to Astroline's bogus claim of minority control.

<sup>6</sup> Other similarly suspect legal assumptions would also have to be made before Astroline could be deemed to have standing here. For example, Astroline's "minority control" is based solely on its claims concerning Mr. Ramirez' interest. But Astroline has never claimed that Mr. Ramirez owns more than a 21% equity interest in Astroline. Thus, even if this Court were inclined to overlook Mr. Ramirez' non-contribution, it would still have to consider, as a threshold matter, whether an entity may be deemed to be "minority-controlled", for  
(continued...)

But if Astroline is not minority-controlled, it is not eligible to take advantage of the distress sale policy even if that policy were deemed, *arguendo*, to be constitutional. Thus, Astroline has no standing to challenge the decision below because, in order to do so, Astroline must assert not its own interests, but merely the interests of a class (*i.e.*, minority groups or minority individuals) of which Astroline is not properly a member. Since Astroline therefore cannot properly assert standing to raise the issues discussed in its Petition, that Petition can and should be summarily rejected.

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<sup>6</sup>(...continued)  
constitutional purposes, when no more than 21% of its equity is held by supposed minorities. Further, the Court would have to consider whether any claim to racially disparate treatment which a minority individual may have is transferrable to a limited partnership in which that individual owns, at most, only 21% of the equity. Additionally, according "minority" status to Astroline while it is a debtor-in-possession appears to be inconsistent with the limited, trustee role assigned to that position. See 11 U.S.C. §§704, 1107. How, after all, can a trustee acting on behalf of creditors be deemed a "minority" free to provide "minority programing" (whatever that might be)? Rejection of Astroline's Petition on the basis of Mr. Ramirez' non-contribution would obviate consideration of these additional questions.

## II.

**THE DISTRESS SALE POLICY IS DISTINCT  
FROM THE COMPARATIVE PREFERENCE POLICY  
AND THE DECISION BELOW IS THUS  
NOT INCONSISTENT WITH OTHER DECISIONS.**

As is apparent from the initial "Question Presented" in Astroline's Petition, Astroline is not seeking certiorari on the basis of any conflict between the decision below and any other decision of any other court. Rather, Astroline is merely seeking another opportunity to argue that the distress sale policy is constitutional. That effort, however, is unavailing.

Astroline does seem to suggest that two D.C. Circuit decisions affirming the FCC's comparative preference policy for minorities may support Astroline's position before this Court. See Petition at 11, 22-23, citing *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985) and *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *petition for cert. filed sub nom. Metro Broadcasting Inc. v. FCC*, 58 U.S.L.W. 3242 (U.S. Sept. 18, 1989) (No. 89-453). But in advancing that suggestion, Astroline fails to point out that the comparative preference policy at issue in those cases is clearly distinct from the distress sale policy.

The FCC's comparative preference policy does not exclude non-minorities from consideration. That policy applies to the FCC's consideration of mutually exclusive applications for construction permits for new broadcast

stations. In comparing the qualifications of competing applicants, the FCC awards qualitative enhancement credit to applicants whose principals include minority individuals committed to participating in the management of the proposed station. *E.g.*, *Radio Jonesboro, Inc.*, 100 F.C.C.2d 941 (1985). However, such enhancement credit is but one comparative factor considered in the overall comparative analysis. Other enhancement credits -- totally unrelated to minority ownership -- are awarded for, *e.g.*, local residence, involvement in local activities, and past broadcast experience. *E.g.*, *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965); *Radio Jonesboro, Inc.*, *supra* (local residence and minority ownership held to have equal significance in comparative analysis). Thus, the minority comparative preference policy does not exclude non-minorities and does not even provide minorities with any necessarily dispositive advantage. Rather, that policy merely permits the FCC to consider racial status as one of a number of factors in the licensing process.<sup>7</sup>

By contrast, the distress sale policy is available only to minorities. As is demonstrated by this very case, non-minorities simply need not apply.

Moreover, since the comparative preference policy is part of the comparative licensing process, claims of minority ownership and control are subject to close scrutiny and adversarial challenge in the crucible of the

<sup>7</sup> Shurberg takes no position here on the constitutionality of the comparative preference policy, although Shurberg does note that serious questions have been raised about certain of the assumptions underlying that policy. See *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *reh'g en banc granted and opinion vacated* (October 31, 1985).

administrative comparative hearing process. That is, competing applicants are afforded full opportunity, through discovery and cross-examination, to demonstrate that a supposedly "minority-controlled" applicant is, in fact, nothing more than a sham. See, e.g., *Capital City Community Interests, Inc.*, 2 FCC Rcd 1984, 1987 (Rev. Bd. 1987). Competing applicants also have the opportunity to explore whether any minority applicant has been the victim of any past discrimination which might entitle that individual to special remedial consideration.

By contrast, as illustrated in this case, the distress sale policy provides no such opportunities. Instead, the FCC appears ready and willing to accept without question virtually any claim of "minority control". And, when an opposing party such as Shurberg manages, despite the lack of discovery, to present strong documentary evidence undermining a claim of minority control, the FCC simply ignores it.<sup>8</sup> Similarly, the FCC totally ignored Shurberg's

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<sup>8</sup> See n.4, *supra*. At Page 19 of its Petition, Astroline claims that "the FCC is alert to ferret out distress sale purchasers who are merely minority 'fronts'." This assertion is especially surprising coming from Astroline in the particular context of this case. As discussed above, in order to credit Astroline's own claim of "minority-control", one would have to believe that non-minority individuals who had no personal familiarity with Mr. Ramirez were nevertheless willing to enter into a partnership with him, make more than \$24,000,000 in capital contributions to that partnership (as opposed to Mr. Ramirez' mere \$210 contribution), and give Mr. Ramirez complete and absolute control of that partnership. Such a scenario does not comport with ordinary experience or normal business judgment. And yet the FCC simply rubber-stamped Astroline's claim, belying Astroline's claims to this Court concerning the agency's supposed vigilance.

observation that Astroline had not, in any event, shown that it had been the victim of past discrimination.

In light of these major distinctions between the comparative preference policy and the distress sale policy, it is clear that any decisions concerning the former are irrelevant to questions presented concerning the latter. Indeed, Judge Silberman, a member of the majority below, specifically recognized that the two policies are distinguishable. Petitioner's Appendix at 13a.

It is equally clear that the decision below is consistent with this Court's recent decisions in the area of reverse discrimination. While those decisions<sup>9</sup> have given rise to some questions concerning their ultimate reach, the decision below falls well within the readily discernible metes and bounds of those cases. This Court has indicated that, while race-based governmental policies may be permissible in some contexts, any such policy must be remedial in nature and narrowly tailored to address compelling governmental interests in the least constitutionally objectionable manner. See *Croson*. It is clear that the majority below considered in detail and properly applied the standards of this Court's cases in that regard. Certiorari is thus neither necessary nor appropriate.

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<sup>9</sup> The four primary reverse discrimination cases of this Court are: *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); and *City of Richmond v. J.A. Croson Co.* ("Croson"), 109 S.Ct. 706 (1989).

## III.

**NO OTHER BASIS FOR REVIEW  
OF THE DECISION BELOW EXISTS.**

Astroline argues that the decision below "disregard[ed]" the "express approval" of the distress sale policy by Congress. Petition at i. Astroline's discussion on that point, however, omits a number of important details which undermine its argument.

The legislative record cited by Astroline consists of three particular actions which are said by Astroline to demonstrate "express" Congressional approval of the distress sale policy. The first is the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087. That act, however, did not codify or otherwise "express[ly] approve" the distress sale policy. Rather, it merely authorized the FCC to utilize a lottery in place of the comparative hearing process. Congress did include in the act language requiring the maintenance, in the initial licensing process, of a minority preference mechanism. The act itself did not, however, address the distress sale policy.

The Conference Committee Report accompanying the act did include a passing reference to the distress sale policy. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 44 (1982). That passing reference in a committee report could hardly be deemed to represent "express approval", as Astroline claims. The FCC itself acknowledged, in its *en banc* brief in *Steele*, *supra*, and in its 1986 *Notice of Inquiry*, *supra*, that the extremely limited remarks in the report could not, by themselves, provide the constitutional

support necessary for a race-based governmental scheme such as the distress sale policy.

But even if it did constitute, *arguendo*, some measure of "approval", however indirect, the distress sale policy mentioned in the Conference Committee Report was not the same policy which was applied below. Shortly after the passage of the Communications Amendment Act of 1982, the FCC modified its distress sale policy. The policy at the time the Act was passed provided that, in order to be eligible for distress sale treatment, a minority entity would have to have an ownership structure consisting of at least 50% minorities. *See 1978 Policy Statement, supra*. Thereafter, the FCC amended the policy to lower that requirement to 20%. *See 1982 Policy Statement, supra*. Since Astroline's claimed minority ownership consisted of only 21%, it is clear that Astroline was not seeking, and could not have sought, to take advantage of the policy mentioned in passing by the Conference Committee. Therefore, it is inaccurate to claim that the extremely limited and indirect 1982 Committee reference to a different distress sale policy constituted "express approval" of the policy at issue here.

The only other instances of alleged Congressional approval cited by Astroline appear not in the Communications Act or in any other codification, but rather in the 1987 appropriations act for the entire Federal government. Pub. L. No. 100-202, 101 Stat. 1329 (1987). That is, Congress did not choose to include the distress sale policy in the Communications Act. Rather, in one sentence in the voluminous Federal budget bill, Congress merely forbade the FCC from reconsidering or

modifying its minority ownership policies, including the distress sale policy. In relying on this action, Astroline neglects to mention several points:

- The 1987 budget bill was passed some three years after the FCC's action in this case. As Judge Silberman noted in his opinion below, "Congress cannot, after the fact, change a law that had effect three years earlier." Petitioner's Appendix at 51a.
- The 1987 budget bill is not based on any specific record and includes no detailed findings. Instead, it merely cites the 1982 Committee report which, as described above, was itself inapposite to the question presented in this case and (even in the FCC's view, at least in 1986) inadequate for the purposes cited by Astroline.
- Press reports, published shortly after the 1987 appropriations act was passed, revealed that the source of the reference to the minority ownership policies in that bill was none other than Astroline. Representatives of Astroline were quoted as having undertaken a substantial lobbying effort in order specifically to assist Astroline in its litigation of this case. As Judge Silberman observed, Congressional interference in on-going judicial proceedings raises serious constitutional questions relating to the separation of powers. See Petitioner's Appendix at 50a. Moreover, Shurberg questions the propriety of a litigant attempting, through the legislative process, to alter retrospectively the outcome of on-going litigation.

*See Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966).

While Astroline makes much of language from *Croson* concerning the expansive powers of Congress, Astroline fails to note that that discussion (which does not appear in a portion of Justice O'Connor's opinion comprising the Court's opinion) of those powers occurs in the context of § 5 of the Fourteenth Amendment. *See Croson*, 109 S.Ct. at 718. That language must thus be viewed as relating to Congress' power to remedy past instances of discrimination. But here it has never even been alleged, much less proven, that the FCC has ever discriminated in its broadcast licensing processes or that Astroline has ever been the victim of any discrimination. In fact, throughout this case the FCC has specifically and repeatedly stated that the distress sale policy was not adopted to remedy any discrimination. *See, e.g.*, Brief of FCC below, filed May 15, 1985, at SA-2 ("The minority ownership policies do not constitute an affirmative action place designed to provide remedies to individuals for the effects of past discrimination."). Astroline's reliance on that language from *Croson* is thus misplaced.

Shurberg concedes that the Constitution does accord Congress substantial authority. However, that authority is specifically limited by the Constitution itself, including, *inter alia*, the Fifth and Fourteenth Amendments. With those limitations specifically in mind, the court below carefully considered Astroline's claims about the effect of the Congressional actions cited in its Petition, and the court below correctly concluded that Astroline's claims had

no merit. No review of that decision by this Court is necessary.

### CONCLUSION

Contrary to the impression which Astroline attempts to create, the decision below is an exceptionally narrow one, consisting of only four sentences and relating to only one limited policy of the FCC. That decision thus has extremely limited precedential effect. The separate concurring opinions of Judges Silberman and MacKinnon reflect that careful and detailed consideration was given to all relevant arguments and authorities. Astroline has demonstrated no basis at all for review of the decision below by this Court, and no such basis exists.

For the reasons stated, the Petition should be denied.

Respectfully submitted.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP, PETITIONER

v.

SHURBERG BROADCASTING OF HARTFORD, INC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE FEDERAL COMMUNICATIONS  
COMMISSION IN OPPOSITION**

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30 pp

### **QUESTION PRESENTED**

Whether the Federal Communications Commission's minority distress sale policy, which permits a limited category of licenses to be transferred only to minority-controlled firms, violates the equal protection component of the Fifth Amendment.

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**BRIEF FOR THE FEDERAL COMMUNICATIONS  
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---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-112a) is reported at 876 F.2d 902; the orders and opinions filed on the denial of the petition for rehearing and suggestion of rehearing en banc (Pet. App. 143a-154a; *id.* at 155a-160a) are reported at 876 F.2d 953 and 876 F.2d 958, respectively. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 113a-129a) is reported at 99 F.C.C.2d 1164.

**JURISDICTION**

The judgment of the court of appeals was entered on March 31, 1989. A petition for rehearing was denied on

June 16, 1989 (Pet. App. 143a-144a). By an order dated September 13, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 29, 1989. The petition for a writ of certiorari was filed on October 30, 1989 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

### A. Background

#### 1. Distress Sale Program

In the Communications Act of 1934, Congress assigned to the Federal Communications Commission the exclusive authority to grant, and oversee the transfer of, licenses to build and operate radio and television stations in the United States. See 47 U.S.C. 151, 301, 303, 307. The FCC generally prohibits a television or radio broadcast licensee, whose license has been designated for a revocation hearing, or whose renewal application has been scheduled for a qualification hearing, from assigning or transferring that license until the Commission has determined that the licensee remains qualified to hold the authorization. See, e.g., *Northland Television, Inc.*, 42 Rad. Reg.2d (P & F) 1107, 1110 (1978); see also Pet. App. 4a-5a. In 1978, as part of its efforts "to further encourage broadcasters to seek out minority purchasers," *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 983 (1978) [hereinafter *1978 Policy Statement*], the FCC instituted the minority distress sale program. That program

permit[s] licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues \* \* \*, to transfer or assign their licenses at a "distress sale" price to applicants with a significant minority ownership interest, as-

suming the proposed assignee or transferee meets other qualifications.

*Ibid.* (footnote omitted).

Under the distress sale program, a qualified minority applicant is one that meets the Commission's basic qualifications and in which the minority ownership interest exceeds 50% or is controlling. See *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 853 (1982).<sup>1</sup> The distress sale price, to receive Commission approval, must be no higher than 75% of the combined fair market value of the station and license. See *Grayson Enterprises, Inc.*, 47 Rad. Reg.2d (P & F) 287, 293 (1980).<sup>2</sup>

#### 2. Development of the FCC's Minority Ownership Policies

Until the 1970s, the Commission had taken relatively few formal steps that departed from its policy of selecting applicants for radio and television broadcast licenses on the basis of race-neutral criteria. See generally *Policy Statement on Comparative Broadcast Hearings*, 1

<sup>1</sup> The FCC has implemented a different rule with respect to an applicant organized as a limited partnership: if there is a general partner who is a minority with a 20% interest in the partnership, and who will exercise "complete control over [a] station's affairs," that partnership qualifies as one with "significant minority involvement." *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 855 (1982).

<sup>2</sup> From fiscal years 1979 through 1987, the FCC has approved only 38 distress sales. During that same period, the Commission approved a total of approximately 9,000 sales of broadcast stations. Thus, distress sales have accounted for 0.4% of all broadcast station sales during that nine-year period. See FCC C.A. Pet. for Rehearing and Suggestion for Rehearing En Banc 11-12; see also Pet. 14.

F.C.C.2d 393 (1965).<sup>3</sup> In 1973, however, the District of Columbia Circuit concluded that there was a dearth of minorities in broadcasting and that promoting greater minority ownership in the broadcasting industry would foster program diversity. The court of appeals therefore directed the Commission to give some "favorable consideration" to an applicant who proposes to include racial minorities among its owners who will participate in managing the station. *TV 9, Inc. v. FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974); see *id.* at 935-938; *id.* at 941-942 (supplemental opinion of Fahy, J.).<sup>4</sup> Accord *Garrett v. FCC*, 513 F.2d 1056, 1062-1063 (D.C. Cir. 1975).<sup>5</sup>

As a result of the *TV 9* and *Garrett* decisions, together with its own studies, see, e.g., 1978 *Policy Statement*,

<sup>3</sup> During the late 1960s, the FCC had addressed the problem of racial discrimination in licensees' employment practices. See generally *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969).

<sup>4</sup> The court of appeals stated that

when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of views.

495 F.2d at 938 (footnotes omitted).

<sup>5</sup> The *Garrett* court stated that "[t]he entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that 'reasonable expectation,' without 'advance demonstration,' gives them relevance." 513 F.2d at 1063 (footnotes omitted).

68 F.C.C.2d at 980-981; Minority Ownership Task Force, FCC, *Report on Minority Ownership in Broadcasting* 1-3, 8-12, 30-31 (1978) [hereinafter *Task Force Report*], the FCC implemented, among other measures, its "distress sale" policy, which permits a limited category of licenses to be transferred only to minority-controlled firms. See 1978 *Policy Statement*, 68 F.C.C.2d at 983; see also *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1028-1029 (D.C. Cir. 1981). The *Task Force Report* recounted that "[d]espite the fact that minorities constitute approximately 20 percent of the population, they control fewer than one percent of the 8500 commercial radio and television[ ] station[s] currently operating in this country." *Task Force Report* at 1 (emphasis in original). The Task Force viewed that "[a]cute underrepresentation of minorities among the owners of broadcast properties [as] troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience," *ibid.*, and found that "[u]nless minorities are encouraged to enter the mainstream of th[is] commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, nonminority audience will be deprived of the views of minorities," *ibid.*

The FCC credited these findings and, in calling for "broadcasters to seek out minority purchasers" to reduce the lack of minority participation in broadcast ownership, 1978 *Policy Statement*, 68 F.C.C.2d at 983, announced its commitment to the view that "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming \* \* \*, [and that] an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum." *Id.* at 981. The Commission explained that because of

the continuing underrepresentation of minorities in broadcast ownership, and because minority con-

trolled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation, [the Commission concluded that] full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First Amendment.

*Waters Broadcasting Corp.*, 91 F.C.C.2d at 1264, 1265.<sup>6</sup>

<sup>6</sup> These findings also undergird other FCC policies designed to promote greater minority participation in broadcasting. Since 1978, the FCC has sought to increase minority participation in broadcasting by awarding tax certificates, *i.e.*, incentives, to station owners who sell facilities to minority-controlled applicants. See 26 U.S.C. 1071; 1978 *Policy Statement*, 68 F.C.C.2d at 982-983. By statute, Congress has also directed the FCC to use minority preferences in the random assignment of certain low-power stations. See 47 U.S.C. 309(i)(3)(A).

Moreover, along with the distress sale program, the FCC implemented a policy of awarding preferences for minority ownership in comparative proceedings. See *WPIX, Inc.*, 68 F.C.C.2d 381, 411-412 (1978); see also *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264 & n.13 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985); 1978 *Policy Statement*, 68 F.C.C.2d at 981-983. The District of Columbia Circuit recently upheld the constitutionality of the FCC's policy of awarding a qualitative enhancement for minority ownership in comparative licensing proceedings. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), petition for cert. pending *sub nom. Metro Broadcasting, Inc. v. FCC*, No. 89-453. In a separate submission filed this date, the FCC has opposed the petition for a writ of certiorari filed by the unsuccessful license applicant in that case. We have provided a copy of that brief to counsel for petitioner in this case.

### 3. Congressional Oversight of the FCC's Minority Ownership Policies

In 1982, Congress amended the Communications Act of 1934 to authorize the FCC to award licenses under a random selection system, and directed the FCC, in creating any such lottery procedure, to grant "an additional significant preference \* \* \* to any applicant controlled by a member or members of a minority group." 47 U.S.C. 309(i)(3)(A); see note 6, *supra*. Congress was aware that minorities "traditionally have been extremely under-represented in the ownership of telecommunications facilities and media properties." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 44 (1982). Consequently, Congress was of the view that

[o]ne means of remedying the past economic disadvantage to minorities which has limited their entry into \* \* \* the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media \* \* \*, is to provide that a significant preference be awarded to minority-controlled applicants in FCC licensing proceedings \* \* \*.

*Ibid.*; see also H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981).

In 1987, in response to the FCC's initiation of inquiry proceedings to reconsider the appropriateness of its policies that seek to promote minority ownership in broadcasting, see pp. 13-14, *infra*, Congress enacted an appropriations provision that prohibited the Commission from spending any appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a reexamination of" those policies. Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202,

101 Stat. 1329-32. The Senate Appropriations Committee, the author of that prohibition, explained:

The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority \* \* \* audiences.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). Congress has since extended the prohibition through fiscal year 1989, see Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217, and has recently renewed that extension for the current fiscal year, 1990. See Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021.<sup>7</sup>

<sup>7</sup> On November 21, 1989, the President signed the appropriations provision into law. See also H.R. Conf. Rep. No. 299, 101st Cong., 1st Sess. 64 (1989); 135 Cong. Rec. H7644 (daily ed. Oct. 26, 1989); 135 Cong. Rec. S12,265 (daily ed. Sept. 29, 1989).

In recent years, Congress has continued to oversee the FCC's minority preference programs. See, e.g., *Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. Pt. 1, at 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations—Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media—Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983). Following the decision in this case, Congress again held hearings to examine the current status of those programs. The Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, held hearings

## B. Proceedings in the Present Case

### 1. The FCC's Initial Licensing Proceedings

a. The FCC's proceedings at issue here involve the broadcast license for Channel 18 (WHCT-TV), Hartford, Connecticut, which was held by Faith Center, Inc. After the Commission had designated Faith Center's license renewal application for a noncomparative hearing,<sup>8</sup> Faith Center, in February 1981, petitioned the Commission for permission to make a distress sale to the Television Corporation of Hartford. The FCC granted that request, *Faith Center, Inc.*, 88 F.C.C.2d 788 (1981), but the proposed sale was not closed. Alan Shurberg, sole owner of Shurberg Broadcasting Company of Hartford, Inc. (collectively "Shurberg"), among others, petitioned the FCC to deny that application. In September 1983, the Commission granted Faith Center's request to pursue a second proposed distress sale to Interstate Media Corporation. *Faith Center, Inc.*, 54 Rad. Reg.2d (P & F) 1286 (1983). See Pet. App. 6a-8a.<sup>9</sup>

on September 15, 1989, to examine further the issue of minority ownership of broadcast stations. See *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished).

<sup>8</sup> In a related proceeding, the Commission had dismissed Faith Center's license renewal application for its television station in San Bernardino, California, because Faith Center had refused to cooperate in the proceeding. See *Faith Center, Inc.*, 82 F.C.C.2d 1 (1980), reconsid. denied, FCC No. 81-235 (May 12, 1981), *aff'd mem. sub nom. Faith Center, Inc. v. FCC*, 679 F.2d 261 (D.C. Cir. 1982), cert. denied, 459 U.S. 1203 (1983).

<sup>9</sup> Shurberg sought judicial review of the FCC's order that authorized Faith Center to pursue a second distress sale. The court of appeals dismissed that appeal on ripeness grounds. *Shurberg v. FCC*, No. 83-2098 (D.C. Cir. May 24, 1984).

Thereafter, Shurberg, in December 1983, tendered to the FCC an application for a permit to build a television station in Hartford, an application that would be mutually exclusive of Faith Center's pending renewal application for Channel 18. The Commission rejected Shurberg's filing, because the controlling regulations precluded it from accepting applications that competed with designated-for-hearing renewal applications until the resolution of the noncomparative proceedings. See 47 C.F.R. 73.3516(e). Meanwhile, Faith Center and Interstate Media were unable to close the proposed distress sale. As a result of the aborted distress sale to Interstate Media, Faith Center's renewal application automatically reverted to designated-for-hearing status. Pet. App. 8a, 116a-117a.

b. In April 1984, Shurberg requested the Commission to designate his previously filed construction permit application for a comparative hearing with Faith Center's renewal application. In June, however, Faith Center once again sought the Commission's approval to make a distress sale. Faith Center requested permission to sell to petitioner Astroline Communications Company Limited Partnership, "a financially qualified minority applicant [which is] experienced in broadcast operations." J.A. 490. Shurberg opposed the distress sale on a number of grounds, including his contention that the Commission's distress sale program violated his constitutional right to equal protection. Shurberg therefore urged the Commission to set his application for a comparative hearing. Pet. App. 8a-9a.

c. In December 1984, the FCC approved Faith Center's application for permission to assign its broadcast license to petitioner under the distress sale program. Pet. App. 113a-129a; see *Faith Center, Inc.*, 99 F.C.C.2d 1164

(1984).<sup>10</sup> The Commission rejected Shurberg's constitutional challenge to the minority distress sale program as "without merit." Pet. App. 122a. In support of that program, the Commission cited its findings of "an acute underrepresentation of minorities among the owners of broadcast stations and that views of racial minorities were inadequately represented in the broadcast media," *ibid.*, together with the Commission's previous observations "that increasing minority ownership of broadcast stations would result in diversity of control of a limited resource, the broadcast spectrum, and would result in a more diverse selection of programming for the entire viewing and listening public." *Id.* at 122a-123a.

The Commission also found support in decisions of the District of Columbia Circuit, such as *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 609-611 (1984), cert. denied, 470 U.S. 1027 (1985), which have "repeatedly defined as an important public interest objective the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations." Pet. App. 123a. And the Commission recognized that Congress,

<sup>10</sup> The FCC rejected Shurberg's argument that he was entitled to a comparative hearing against Faith Center's renewal application. Pet. App. 117a-122a. The Commission acknowledged as a "close question" the issue whether "the public interest in permitting competing applications to be filed, as articulated in [*New South Media Corp. v. FCC*, 685 F.2d 708 (D.C. Cir. 1982)], outweighs the goals of [its] minority ownership policies in this case." Pet. App. 121a. The Commission determined, however, that its

minority ownership policies, as reflected here in the distress sale proposal, are sufficiently important to warrant maintaining Faith Center's renewal application in hearing status, protected from competing applications, for a sufficient additional time to permit us to consider the pending application to assign the license to [petitioner].

*Ibid.*

in requiring that the Commission incorporate "significant preferences for minority applicants \* \* \* into any random selection licensing scheme," has "reaffirmed the importance of fostering minority ownership of broadcast stations." *Ibid.*; see 47 U.S.C. 309(i).

d. Shurberg then filed a petition for review of the Commission's order in the District of Columbia Circuit. Meanwhile, on January 23, 1985, Faith Center and petitioner closed the distress sale. Petitioner brought the Channel 18 license and station assets for \$3.1 million; the fair market value of the license and station assets had been appraised at \$6,520,000. See Pet. App. 11a, 30a n.17; J.A. 1064.

## 2. Intervening Legal and Administrative Proceedings

a. The disposition of Shurberg's petition for review was delayed for several years because of events concerning related proceedings. In August 1985, after briefing in Shurberg's case had been completed, the court of appeals held that the FCC had exceeded its statutory authority by adopting a female preference in comparative licensing proceedings. *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985). On October 31, 1985, however, the court of appeals, sitting en banc, granted a private party's petition for rehearing in the *Steele* case, vacated the panel's opinion, and, on November 22, ordered the parties to file supplemental briefs on the pertinent statutory and constitutional issues. In September 1986, the FCC filed a supplemental brief in the *Steele* case, stating that "the Commission believes that both [its] gender and racial preference schemes conflict with equal protection standards under the Constitution." Brief for FCC on Rehearing En Banc at 14, *Steele v. FCC*, *supra*. In light of its position, the FCC asked the court of appeals to remand the case to the Commission for further

proceedings to explore the underpinnings of its policies. See Appendix to Brief for FCC on Rehearing En Banc, *Steele v. FCC*, *supra*.

On October 9, 1986, the court of appeals granted the FCC's motion for remand in the *Steele* case. And in December 1986, the Commission initiated a separate non-adjudicatory inquiry proceeding to consider the validity of its female and minority ownership policies. See *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd 1315 (1986) (MM Dkt. No. 86-484), modified, 2 F.C.C. Rcd 2377 (1987). The Commission explained that, in light of recent developments in the law, it needed to reconsider both the factual and legal bases for the ownership policies. See 1 F.C.C. Rcd at 1317-1318.

b. As a result of the remand in the *Steele* case, together with the related developments, the FCC asked the court of appeals to remand the record in the instant case in order for the Commission to reexamine its distress sale policy. The court of appeals granted that motion in June 1987, and remanded the case to the FCC. Pet. App. 11a. On remand, the FCC held the case in abeyance pending the outcome of its inquiry proceeding reexamining its minority ownership policies.

c. On December 22, 1987, the President signed into law the Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, which, among other things, appropriated funds for FCC salaries and expenses for that fiscal year. That law provided that

none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the [FCC] with respect to comparative licensing, distress sales

and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended \* \* \*, which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

101 Stat. 1329-31.

The FCC complied with that legislation and on January 14, 1988, closed its inquiry proceeding and reinstated its policy of awarding gender and racial preferences in comparative licensing proceedings, and of preferring minority-controlled applicants in distress sales. See, e.g., *Faith Center, Inc.*, 3 F.C.C. Rcd 868 (1988).

d. Shurberg then asked the court of appeals for expedited resolution of the pending case. The court of appeals agreed to render a decision "in the normal course of business." Pet. App. 13a.<sup>11</sup>

<sup>11</sup> In October 1988, while the case was pending before the court of appeals, several of petitioner Astroline's creditors filed an involuntary petition in bankruptcy against the firm under 11 U.S.C. 701 *et seq.* *In re: Astroline Communications Co.*, No. 2-88-01124 (Bankr. D. Conn. Oct. 31, 1988). The creditors claimed that Astroline owed them more than \$11.6 million, that Astroline was seriously delinquent in making payments on those debts, that Astroline had admitted that it was generally not paying its debts on time, and that, with limited exceptions, Astroline had suspended all payments to its program suppliers. See Petition 2, *In re: Astroline Communications Co.*, No. 2-88-01124 (Bankr. D. Conn. Oct. 31, 1988). In December 1988, Astroline elected, under 11 U.S.C. 706, to convert the proceeding into a voluntary reorganization under Chapter 11 of the Bankruptcy Code.

### 3. The Court of Appeals decision

A divided court of appeals struck down the Commission's minority distress sale program as unconstitutional. Pet. App. 1a-112a. In a brief per curiam opinion, the panel majority held that this program "unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote programming diversity." *Id.* at 2a. The court accordingly remanded the case to the Commission for further proceedings. Judges Silberman and MacKinnon, who comprised the panel majority, each filed separate opinions concurring in the judgment. See *id.* at 3a-52a (Silberman, J.); *id.* at 53a-69a (MacKinnon, J.). Chief Judge Wald filed a dissenting opinion. See *id.* at 70a-112a.<sup>12</sup>

See Order, *In re: Astroline Communications Co.*, No. 2-88-01124 (Bankr. D. Conn. Dec. 1, 1988).

Astroline's bankruptcy proceeding remains pending; Astroline has continued to operate Channel 18 as a "debtor in possession." Astroline has also informed the Commission that its financial condition and future operation of the station are uncertain. See *Arnold L. Chase*, 4 F.C.C. Rcd 5085 (1989).

<sup>12</sup> As a threshold matter, Judge Silberman concluded that the Commission had properly applied the governing statute and regulations (47 U.S.C. 307(c); 47 C.F.R. 73.3516(e)) in concluding that Shurberg was not entitled to a comparative hearing. See Pet. App. 13a-17a. Neither Judge MacKinnon nor Chief Judge Wald disagreed expressly with this conclusion.

In addition, Judge Silberman concluded that the Commission had not exceeded its statutory authority under the Communications Act of 1934 when it adopted the minority distress sale policy. See Pet. App. 17a. Judge MacKinnon apparently agreed with this conclusion. See *id.* at 56a ("the case has leveled down to a constitutional attack on the distress sale policy"). Chief Judge Wald addressed the constitutional issue in light of the majority's decision to do so. See *id.* at 72a-73a n.3.

a. Judge Silberman identified the "constitutional issue [as] whether or not the distress sale policy, by creating a preference for minority purchasers, violates the equal protection component of the Fifth Amendment." Pet. App. 18a. After reviewing this Court's recent pertinent decisions concerning government-sponsored minority preferences,<sup>13</sup> he extracted several guiding principles, including: (1) such preferences "are constitutionally permissible under certain limited circumstances, but they may not be based on the desirability *per se* of achieving racial balance or proportional representation of minorities in selected institutions," *id.* at 22a; (2) the "nature of the evidence required to establish the existence of prior discrimination varies with the authority of the governmental body imposing the remedial preference," *id.* at 22a-23a; and (3) "[a]ssuming the factual predicate for remedial action by any governmental body has been established, a reviewing court must still ensure that the use of race is narrowly tailored to the remedial purpose." *Id.* at 23a.

In Judge Silberman's view, the Commission sought to justify its minority distress sale program "both as a means to foster diverse programming and as a remedy for past discrimination." Pet. App. 25a. Turning first to the latter justification, he found that "[n]either Congress nor the FCC ever found any evidence to link minority 'underrepresentation' to discrimination by the FCC or to particular discriminatory practices in the broadcasting industry," *id.* at 27a, and that, in any event, the Commission's program "does not conform to the stricture of the Constitution because it is not narrowly tailored to remedy

<sup>13</sup> *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the University of Cal. v. Bakke*, 438 U.S. 265 (1978).

past discrimination." *Id.* at 29a. Accordingly, he concluded that the remedial justification does not support the Commission's program.

Turning to the programming diversity rationale, Judge Silberman rejected the proposition that such an interest, in the context of this case, is sufficiently compelling to support the race-based preference. See Pet. App. 36a-41a. He noted, among other things, that the Commission, in recently abandoning the "fairness doctrine," determined "that there no longer is an inadequate diversity of viewpoints in television programming." *Id.* at 40a. Judge Silberman concluded that, in any event, the Commission's distress sale policy was not narrowly tailored to achieve that goal. In his view, "[a]s a means to promote diverse programming, the distress sale policy rests on the questionable premise that minority ownership will by itself lead to minority programming (or programming that might be thought to have a minority perspective)." *Id.* at 41a-42a. Furthermore, he rejected the contention that Congress had made sufficient findings that support a nexus between program diversity and minority ownership, see *id.* at 45a-47a, and also concluded that the Commission's policy could not be upheld under the framework outlined by Justice Powell in *Regents of the University of Cal. v. Bakke*, 438 U.S. 265, 315-319 (1978). See Pet. App. 47a-49a.

b. Judge MacKinnon concurred in the judgment, concluding that the Commission's minority distress sale program "does not satisfy the 'narrowly tailored' requirement of equal protection analysis." Pet. App. 54a.<sup>14</sup> In his view,

<sup>14</sup> For that reason, Judge MacKinnon chose not to reach the question "whether either promoting programming diversity or remedying societal discrimination are a sufficiently compelling governmental interest to support the use of government sponsored minority preference programs." Pet. App. 59a-60a n.11.

"the program is open-ended in that circumstances may cause it to be applied to any broadcast licensee without regard to any past discrimination." *Id.* at 61a. As a result, the Commission's program impermissibly "deprive[s] all nonminorities of their right to equal access to a broadcast license." *Ibid.* Similarly, he found that "because the distress sale program has no limits of any character it is not sufficiently tailored to the goal of promoting programming diversity." *Id.* at 63a.<sup>15</sup> Accordingly, Judge MacKinnon concluded that the program "unduly burdens innocent nonminorities." *Id.* at 66a.

c. Chief Judge Wald dissented, concluding overall that the "majority's invalidation of the Commission's ten-year old minority distress sale program \* \* \* impermissibly overturns a considered congressional judgment as to the appropriate means of assuring diversity of viewpoint over the national airwaves." Pet. App. 70a. After reviewing the development of that program, as well as Congress's express endorsements of the Commission's efforts to diversify media control through programs to encourage minority ownership and control, Chief Judge Wald found that the distress sale program is "a deliberately chosen congressional policy." *Id.* at 79a. And, in light of the current case law, she concluded that the policy "is a constitutional means of pursuing Congress' objective: ensuring greater diversity in programming." *Ibid.* She accepted as both reasonable and supported by congressional factfinding the connection between minority ownership

<sup>15</sup> Disagreeing with Judge Silberman, Judge MacKinnon found that Congress had sufficiently determined that there is a nexus between minority ownership and programming diversity. See Pet. App. 64a-66a. He agreed, however, with Judge Silberman's further conclusion that such a congressional determination does not insulate the Commission's distress sale program from the applicable standard of judicial review—"strict scrutiny." *Id.* at 66a.

and diverse programming. See *id.* at 92a-100a. Finally, Chief Judge Wald disputed the conclusion that the Commission's program impermissibly burdens innocent nonminorities, finding that "the near-monopoly exercised by nonminorities over broadcast media—they control approximately 98% of all broadcast licenses—and the very limited circumstances in which the distress sale policy can be invoked, suggest that the burden the policy places on nonminority applicants is acceptable." *Id.* at 109a.

d. On June 16, 1989, a petition for rehearing, together with a suggestion of rehearing en banc, were denied. Pet. App. 143-154a; *id.* at 155a-160a. Chief Judge Wald, joined by Judges Robinson, Mikva, Edwards, and Ruth B. Ginsburg, dissented from the denial of rehearing en banc. *Id.* at 157a-160a.

#### ARGUMENT

This Court is well aware that government-sponsored racial preference programs, like the Federal Communications Commission's minority distress sale program, may involve important and sensitive questions of public policy and constitutional law. See, e.g., *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the University of Cal. v. Bakke*, 438 U.S. 265 (1978). Several considerations, however, suggest that further review of this particular case is not warranted at this time. Accordingly, we submit that review should be denied.

First, petitioner's current precarious financial status makes this case an unsuitable vehicle for addressing the broad legal issues surrounding the validity of the Commission's distress sale program that petitioner raises. See Pet.

11-27.<sup>16</sup> Given its pending bankruptcy proceeding, see note 11, *supra*, petitioner might well not be able to hold the license for Channel 18, regardless of whether the distress sale at issue were ultimately upheld. Rather, an appointed receiver or trustee in bankruptcy, acting on behalf of creditors, might well step in, and under the Commission's settled practice, could be permitted to sell or transfer "the bankrupt's license [if] the transaction will not unduly interfere with the FCC mandate to insure that broadcast licenses are used and transferred consistently with the Communications Act." *LaRose v. FCC*, 494 F.2d 1145, 1148 (D.C. Cir. 1974); see *In re Applications of Channel 64 Joint Venture* 3 F.C.C. Rcd 900 (1988); *D.H. Overmyer Telecasting Co.*, 94 F.C.C.2d 117 (1983). Accordingly, the outcome of the pending bankruptcy action could well deprive this case of any significance with respect to petitioner's holding the license.<sup>17</sup>

Second, the decision below, is the first court of appeals decision to apply this Court's analytical framework in *City of Richmond v. J.A. Croson Co.*, *supra*, to a government-sponsored program involving a racial preference. Cf. *United States v. City of Chicago*, 870 F.2d 1256, 1261 (7th Cir. 1989). Thus, to the extent petitioner seeks this Court's review of the court of appeals' treatment of that decision

<sup>16</sup> Moreover, the distress sale program, since its inception in 1978, has not played a major role in connection with the transfer and sale of broadcast licenses. See note 2, *supra*.

<sup>17</sup> In addition, as matters now stand, petitioner will not automatically be prevented from holding the broadcast license. To the contrary, under the court of appeals' mandate, the Commission must reopen the administrative proceedings to consider the interests of all relevant parties, including petitioner, in the license for Channel 18.

as applied to a particular factual setting, see, *e.g.*, Pet. 12, 15, 17-18, 23, that request may well be premature pending further illumination in the courts of appeals.

Third, petitioner points out (Pet. 11, 22-23) that the court of appeals' decision may not be squared with either *Winter Park Communications, Inc. v. FCC*, *supra*, decided by a different panel of the court of appeals, see note 6, *supra*, or the District of Columbia Circuit's earlier decision in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1985). These cases pose no direct conflict, as each involved a distinct minority ownership program.<sup>18</sup> Nevertheless, they do rely on conflicting rationales and applications of this Court's recent decisions. In *Winter Park* and *West Michigan*, the court of appeals upheld the constitutionality of the FCC's policy of awarding a qualitative enhancement for minority ownership in comparative licensing proceedings. And in so holding, both the *Winter Park* and *West Michigan* courts embraced analyses expressly rejected by the majority below to strike down the FCC's minority distress sale program. See *Winter Park*, 873 F.2d at 352-355; *West Michigan*, 735 F.2d at 609-611.

That intra-circuit conflict does not call for further review by this Court at this time. The Court has long followed the prudential practice of not stepping in to resolve such disputes. *E.g.*, *Davis v. United States*, 417

<sup>18</sup> Under the FCC's minority distress sale policy, the policy at issue in this case, the Commission permits a limited category of licenses to be transferred only to minority-controlled firms. By contrast, under the FCC's policy of awarding a qualitative enhancement for minority ownership in comparative licensing proceedings, the policy at issue in *Winter Park* and *West Michigan*, the Commission takes minority status into account as one factor in a multi-factor comparative process.

U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). And the current status of the District of Columbia Circuit suggests that a departure from this Court's practice is especially unwarranted in this case. That circuit currently has three judgeships vacant; those vacancies are expected to be filled in the foreseeable future. Accordingly, once the court of appeals has its allotted complement of judges, and if issues surrounding the FCC's racial preference policies persist, the entire court of appeals will be able to resolve any inconsistencies among panel decisions.

Finally, as is apparent from the background of this case, see, e.g., pp. 7-8, *supra*, both the FCC and the Congress have paid particular attention to and have closely monitored developments in this evolving area of law and public policy. The current state of affairs, which mandates the FCC's continued use of racial preference policies (subject, of course, to judicial review), stems from Congress's reenactment of the annual appropriations provision. See pp. 7-8 & note 7, *supra*. Accordingly, as the law now stands, Congress must reconsider the subject matter by the close of fiscal year 1990, and in fact has recently held hearings to examine the status and soundness of the FCC's minority ownership policies. See *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished); see also note 7, *supra*. In these circumstances, where Congress is revisiting this complex and sensitive area of the law, intervention by this Court at this time is not necessary.

# CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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DECEMBER 1989

\* The Solicitor General is disqualified in this case.

DEC 3 1989

No. 89-700

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

*Respondent.*

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**MOTION FOR LEAVE TO FILE A PETITION FOR WRIT  
OF CERTIORARI AND  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

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**BRIEF OF AMICI CURIAE CONGRESSIONAL BLACK  
CAUCUS, THE NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE, NATIONAL  
BLACK MEDIA COALITION, AND THE LEAGUE OF  
UNITED LATIN AMERICAN CITIZENS**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

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**No. 89-700**

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ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

*Respondent.*

---

**MOTION FOR LEAVE TO FILE A BRIEF  
AS AMICI CURIAE**

---

The Congressional Black Caucus (CBC), the National Association for the Advancement of Colored People (NAACP), the National Black Media Coalition (NBMC) and the League of United Latin American Citizens (LULAC), hereby respectfully move for leave to file a brief as amici curiae in support of petitioner's petition for certiorari. The Petitioner's counsel of record, the Office of the Solicitor General and the Federal Communications Commission have all consented to the filing. The consent of counsel of record for the respondent was requested but refused. Both the consent and the refusal have been filed with the Clerk of the Court.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

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No. 89-700  
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ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

*Respondent.*

—  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT  
—

BRIEF OF AMICI CURIAE CONGRESSIONAL BLACK  
CAUCUS, THE NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE, NATIONAL  
BLACK MEDIA COALITION, AND THE LEAGUE OF  
UNITED LATIN AMERICAN CITIZENS  
—

INTEREST OF AMICI CURIAE

The Congressional Black Caucus ("CBC") was formed in 1970 when thirteen Black members of the U.S. House of Representatives joined together to strengthen their efforts to address the legislative concerns of Black and minority citizens. The vision and goals of the original thirteen members, "to promote

the public welfare through legislation designed to meet the needs of millions of neglected citizens," has been reaffirmed through the legislative and political successes of the Caucus. The CBC is involved in legislative incentives ranging from full employment to welfare reform, South African apartheid and international human rights, from minority business development to expanded educational opportunity.

The National Association for the Advancement of Colored People ("NAACP") is the oldest and largest civil rights organization in the United States. It is a non-profit corporation with over 500,000 members and 2,300 branches and youth units in the fifty states and the District of Columbia. The basic aims and purposes of the organization are to advance minority participation in all aspects of society and to destroy restrictions, burdens, limitations or barriers based upon race or color. The NAACP has long been involved in strengthening the machinery for combatting discrimination within the media and in maintaining the few policies aimed at remedying societal discrimination and promoting diversity of broadcast programming.

The National Black Media Coalition ("NBMC") is the principal civil rights organization focusing its attention on minority employment and ownership in the broadcast media. It played a central role in the creation of the distress sale policy which is before this Court for review, and participated in this case in the D.C. Circuit as an *amicus curiae*. Since its founding in 1973, NBMC has played a role in dozens of adjudicatory and rulemaking proceedings in which it sought to vindicate and expand the FCC's minority ownership policies.

The League of United Latin American Citizens ("LULAC") is a sixty year old national membership organization concerned with vindicating the civil rights and promoting the educational, economic and social well being of Hispanic Americans in the United States. LULAC has actively participated in promoting minority employment and minority ownership policies in the broadcast media before the FCC and the Courts, including participation in this case in the D.C. Circuit as an *amicus curiae*.

This case, involving as it does the possible weakening of the distress sale policy implemented by the Federal Communications Commission ("FCC") and approved by Congress, is of paramount concern to the *amici*. The policy in question is designed not only to remedy minority underrepresentation in broadcasting, stemming from past discrimination, but also to promote diversity of broadcast programming. It is because of the overriding public consequences of this case that the *amici* are filing this brief as *amicus curiae*.

#### SUMMARY OF ARGUMENT

The decision below presents an important and novel question of federal law and calls into question an established policy of a federal agency and is therefore the type of decision that makes certiorari appropriate for this Court. Further, certiorari would be appropriate because there is now no adequate guidance on the issues in this case from the D.C. Circuit, which is the only circuit that can resolve FCC issues arising in adjudications. 47 U.S.C. § 402(b).

The FCC's reliance on diversification is a sufficient basis for establishing a distress sale policy. Diversi-

fication constitutes a compelling governmental interest. Because Congress has specifically endorsed the FCC's distress sale policy, the decision below raises serious questions of the separation of powers since Judge Silberman and Judge MacKinnon did not give proper deference to Congressional findings as required under the Separation of Powers Doctrine.

While *amici* believe that Congress may rely on the promotion of diversity as a basis for the distress sale policy, *amici* contend in the alternative that if this Court were to find that the diversity rationale is not adequate, it should remand to the FCC with directions for the agency to consider whether it was actively involved in discrimination.

#### ARGUMENT

##### I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW

The decision of the D.C. Circuit presents an important and novel question of federal law which should be decided by this Court. The Court of Appeals erred in holding that the distress sale policy is unconstitutional, applying an incorrect standard of scrutiny and ignoring the findings and intentions of the Congress. This Court should correct this error of law.<sup>1</sup>

Certiorari should also be granted because the decision below overturned an established administrative policy of a federal agency. This Court has generally grant certiorari when the ruling of a Court of Appeals invalidates an established agency practice, thus seri-

<sup>1</sup> *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 365 (1955).

ously interfering with an important administrative policy. See e.g., *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 342-43 (1979). This type of interference is especially egregious where Congress and this Court have actively encouraged such a policy. *Amici* respectfully submit that the Court should address this issue to provide much needed future guidance to the Commission and those regulated by it.

Finally, direction is needed, and certiorari should be granted, because the decision below has created confusion on FCC matters within the Court of Appeals that only this Court can resolve. On the one hand, the D.C. Circuit has upheld the FCC policy that provides for consideration of integration of minority owners into station management as a factor in comparative licensing hearings. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989); *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). On the other hand, a divided court in this case held that the distress sale policy is unconstitutional. Thus, two different panels within less than one year have made contradictory rulings with respect to the continued viability of the *West Michigan* case. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d at 902 (D.C. Cir. 1989); *Winter Park*, 873 F.2d at 347. Therefore, certiorari is needed in this case in order to clarify the status of the Commission's policy.

## II. THE FCC'S DISTRESS SALE POLICY IS A CONSTITUTIONAL IMPLEMENTATION OF CONGRESS' MANDATE TO PROMOTE DIVERSITY

### A. Promotion of Programming Diversity Through the Distress Sale Policy Serves a Compelling Purpose.

The goal of diversification of information has been, throughout the FCC's history, the most significant social imperative guiding FCC regulation and, under the analysis of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), serves as a sufficient basis for establishing and implementing the race-conscious distress sale policy. The FCC has sought for many years to maximize diversity of ownership of broadcast stations in furtherance of the ultimate goal of maximizing the diversity of programming and viewpoints available to the public.<sup>2</sup> The Commission crystallized those goals in its *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), which accorded major significance to promoting diversity of broadcast expression through diversity of broadcast ownership. The distress sale policy itself was adopted by the FCC because:

"[W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and

<sup>2</sup> See, e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677 (D.C. Cir.), cert. denied, 342 U.S. 830 (1951).

educates the diversified programming which is a key objective not only of the Communications Act of 1934 but also the First Amendment.

*Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979, 981-82 (1978). The distress sale policy has proven effective and has "contribut[ed] significantly to increased minority ownership in broadcasting." *Commission Policy Regarding the Advancement of Minority Ownership in Broadcast*, 92 F.C.C.2d 849, 852 (1982).<sup>3</sup>

In addition, diversification of information is a compelling governmental purpose because it is central to the achievement of First Amendment goals, as this Court recognized in 1943 in declaring the First Amendment to rest upon the principle that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945) (holding that certain exclusive news-sharing arrangements violated the Sherman Act).<sup>4</sup> This Court

<sup>3</sup> Scholarly comment on the distress sale policy has been universally laudatory. McKee, *The Federal Communications Commission and Minority Ownership of Broadcast Facilities: A Federal Administrative/Regulatory Model for the Fostering of Greater Minority Entrepreneurship*, 12 Nat'l. Bar Ass'n. L.J. 75, 84 (1983) (describing the policy as a "positive regulatory action by a governmental agency to foster minority entrepreneurship within the industries over which it has statutory and administrative jurisdiction."). See also, Hammond, *Now You See It, Now you Don't: Minority Ownership in an "Unregulated" Video Marketplace*, 32 Cath. L. Rev. 633, 651 (1983).

<sup>4</sup> See also, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978), quoting *Columbia Broadcasting*

went further, in 1969, when it declared that FCC actions aimed at increasing diversity of information fostered the goals of the First Amendment. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (since broadcasters use a scarce resource, they must provide programming which serves the public interest). Moreover, this Court has ruled that diversification is a valid basis for establishing minority preferences, stating that the FCC's EEO rules "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976). See Frawley, *Revised Expectations: A Look at the FCC's Equal Employment Opportunity Policies*, 32 Fed. Comm. B.J. 291, 292-300 (1981); Smith, *The Broadcast Industry and Equal Employment Opportunity*, 30 Lab. L.J. 659, 662-64 (1979).

**B. The D.C. Circuit Erred in Refusing to Defer to Congress' Endorsement of the FCC's Method of Achieving this Compelling Purpose.**

Congress also has approved the distress sale policy and has thereby implicitly made the findings about societal discrimination, and the appropriateness of a proper and narrowly tailored remedy, which this Court approved in *Fullilove*. In 1982, Congress specifically provided that minority ownership incentives are necessary, stating, "[t]he underlying policy objective of these preferences is to promote the diversification of

*System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973) and *Associated Press v. United States*, 326 U.S. 1, 20 (1945). See also, *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971).

media ownership and consequent diversification of programming content." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982). The Conference Committee concluded that:

"[An] important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities-groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.

*Id.* at 43.

Congress also has recognized the need to remedy past discrimination. "[T]he effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H.R. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982).

In 1987 and 1988, Congress reaffirmed its strong support for minority incentive programs. Congress attached an appropriations rider to its Continuing Resolution. The rider prohibited the FCC from using federal funds to repeal, retroactively apply changes in, or continue reexamination of the comparative li-

censing, distress sales and tax certificate policies. Pub. L. No. 100-202, 101 Stat. 1329 (1987). In reenacting this law for fiscal year 1989, the Senate Appropriations Committee noted that:

The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and woman audiences.

S. Rep. 182, 100th Cong., 1st Sess. 76 (1987).

When Congress reaffirmed its support of the distress sale policy, Congress' intent was clear: it approved the FCC's policy of increasing diversity through minority ownership. Thus with the efforts, endorsement and encouragement of both the this Court and the Congress, the Commission has for more than a decade interpreted the public policy favoring diversification to encompass advancing minority ownership as a means of enhancing diversity of viewpoints in broadcasting and as a means of satisfying a compelling governmental interest.

Realizing the importance of diverse programming, Congress, in which the Congressional Black Caucus<sup>5</sup> is a principal advocate, charged the FCC in 1978 to implement programs such as the distress sale policy. Congress also suggested that minority incentive programs should be implemented to resolve the FCC's

<sup>5</sup> The Congressional Black Caucus endorses this brief supporting the Petition for Writ of Certiorari to this Court.

comparative hearings problems. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

Because Congress has specifically endorsed the FCC's distress sale policy, the D.C. Circuit's ruling that the policy is unconstitutional raises a serious question of the separation of powers between Congress and the courts. This Court still maintains its deference to Congress and the D.C. Circuit should have done so as well. "...[W]e are bound to approach our task with appropriate deference to the Congress, a co-equal [branch]." *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Citing to *Fullilove*, Justice O'Connor in *City of Richmond v. Croson*, 109 S. Ct. 706 (1989) made it clear that courts' role in reviewing actions of Congress is different from their role in reviewing actions of state or local governments. Congress has more power than the states to "identify and redress the effects of society-wide discrimination...." *Id.* at 719. Thus, it is apparent from the Constitution and previous Supreme Court cases that Congress has the power to sanction race-conscious programs such as the distress sale policy in order to remedy past discrimination and to diversify the broadcast industry. See also, *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

However, Judge Silberman and Judge MacKinnon failed to give proper weight to Congressional action. Judge MacKinnon did not defer to the Congressional judgment that the distress sale policy is not appropriately tailored for accomplishing the diversity objective of the FCC, *Shurberg*, 876 F.2d at 930, 933 and Judge Silberman went even further and refused to accept Congress' determination that a nexus exists

between diversity of ownership and diversity of programming. *Id.* at 914-15. Judge Silberman's and, to a lesser extent, Judge MacKinnon's opinions ignore the distinction between the role of the court and that of the Congress in making these judgments and providing direction to administrative agencies. In other words, both judges refused to recognize that the separation of powers doctrine precluded them from holding the Congressionally approved distress sale policy unconstitutional. Their action was in the terms of Judge Wald's dissent, "simply judicial presumptiveness." *Shurberg*, 876 F.2d at 940.

**C: The Court May Remand this Case to the FCC for consideration of Past Involvement in Discrimination by the Agency Itself.**

For the reasons set out above, *amici* believe the findings of Congress and the FCC concerning the need for diversity in programming, and the nexus between that diversity and the distress sale policy, are more than sufficient to warrant reversal of the decision below. *Amici* believe a federal agency need not have discriminated in its own activities and practices in order to implement a race-conscious program such as the one here. But if it did, then race-conscious policies are not only constitutionally appropriate but are necessary to redress to such governmentally sponsored discrimination. Congress and agencies of Congress (here the FCC) may rely on societal discrimination as the basis of these programs even if a non-Federal body could not. *Fullilove*, 448 U.S. at 448; *see also*, *Croson*, 109 S. Ct. at 706. However, if the Court were to conclude that additional justification for the distress sale policy is necessary, it can find that justification in the need to remedy the dis-

criminatory effects of the FCC's own policies and practices.

Although no formal record on the matter yet exists, a full hearing would reveal that the FCC's own policies and practices have contributed to the exclusion of minorities from opportunities in broadcasting, and have lent significant economic support to discriminatory businesses.

In the not-too-distant past, the agency renewed the licenses of applicants with records of flagrant discrimination in programming. *See e.g.*, *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969). The FCC has also held that persons who conduct discriminatory business practices qualify for licensure. *Chapman Radio and Television Co.*, 24 F.C.C.2d 282 (1970) (applicant part owner of segregated cemetery and participated in decision to maintain segregation); *Southland Television Co.*, 10 Rad. Reg. (P&F) 750, *recon. denied*, 20 F.C.C. 1959 (1955) (operator of segregated movie theaters qualified to hold license. FCC awarded full faith and credit to state law which allowed segregation). The FCC has also licensed and thereby has endorsed the policies of colleges and universities that were totally segregated.<sup>6</sup>

<sup>6</sup> Some of the many examples include KASU-FM, Jonesboro, AR, licensed to Arkansas State University in 1957; WBKY-FM, Lexington, KY, licensed to the University of Kentucky in 1941; WUNC-FM, licensed to the University of North Carolina in 1952; KUHF-FM, Houston, TX, licensed to the University of Houston in 1950, KUT-FM, licensed to the University of Texas in 1958;

The FCC not only supported discrimination in its specific licensing decisions, but also adopted policies that had a discriminatory impact. For example, it was not until 1981 that the Commission revoked its so-called *Ultravision* rule, which imposed unrealistically stringent financing requirements that had inhibited minorities from obtaining licenses. See, *Ultravision Broadcasting Company*, 1 F.C.C.2d 544 (1965); repealed in, *New Financial Qualifications Standards for Broadcast Assignment and Transfer Applicants*, 87 F.C.C.2d 200, 201 (1981). The FCC also continues to maintain a policy that favors applicants with prior broadcast experience, and has explicitly refused to discount experience obtained during the period when minorities were excluded from broadcasting jobs. *Radio Jonesboro, Inc.*, 100 F.C.C.2d 941, 946 n.13 (1985). Finally, the FCC has failed to enforce effectively the EEO obligations of broadcast licensees. *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *National Black Media Coalition v. FCC*, 775 F.2d 342 (D.C. Cir. 1985). Not until 1989 did the FCC find a broadcaster guilty of employment discrimination. *Catoctin Broadcasting of New York*, 4 F.C.C. Rcd. 2553, 2558, *recon. denied*, 4 F.C.C. Rcd. 6312 (1989), *appealed*, D.C. Cir. No. 89-1552 (September 14, 1989). Because these reported cases and rulings strongly indicate the FCC's own actions have had discriminatory effects, *amici* respectfully request the Court to grant *certiorari* in this case and, if it

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WTJU-FM, licensed to the University of Virginia in 1957. The FCC thus created an opportunity for further segregation. But for the FCC's action, the schools would not have been able to segregate their schools because these schools could not have operated their schools of broadcasting, designed to prepare students for careers in that field, without an FCC license.

determines that the FCC has not yet offered an adequate justification for the distress sale policy, consider remanding the case to the agency for reconsideration.

### CONCLUSION

For the reasons set forth above, *amici* Congressional black Caucus, National Association for the Advancement of Colored People, League of United Latin American Citizens and National Black Media Coalition respectfully request this Court to grant Astroline's petition and to reverse the judgment of the District of Columbia Court of Appeals.

Respectfully submitted,

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December 5, 1989

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JAN 2 1990

THIS CASE IS SCHEDULED FOR CONSIDERATION ON  
JANUARY 5, 1990

No. 89-700

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IN THE  
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ASTROLINE COMMUNICATIONS COMPANY  
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*Respondents.*

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On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The District Of Columbia Circuit

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**MOTION OF SHURBERG BROADCASTING OF HARTFORD  
FOR LEAVE TO WITHDRAW BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

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January 2, 1990

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In The  
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**MOTION FOR LEAVE TO WITHDRAW  
BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

Respondent Shurberg Broadcasting of Hartford ("Shurberg") hereby moves for leave to withdraw its Brief in Opposition to the Petition for Writ of Certiorari submitted in the above-captioned case by Astroline Communications Company Limited Partnership ("Astroline" or "Petitioner"). Shurberg's Brief was filed with the Court on December 5, 1989.

The instant request to withdraw Shurberg's Brief should not be interpreted as indicating that Shurberg supports *any* of the arguments (individually or collectively) advanced by Astroline in its Petition. To the contrary, Shurberg remains convinced that the Court below correctly concluded that the "minority distress sale policy" of Respondent Federal Communications Commission ("FCC") is unconstitutional, consistent with principles recently articulated by this Court.

What concerns Shurberg is the persistent refusal of the FCC thus far to acknowledge and accept the substantive correctness of the decision below or to recognize the limits which the Constitution imposes on the FCC's activities. In light of that refusal, it appears to Shurberg that consideration by this Court of the merits of this case may be the only way that the issues of this case will finally, conclusively, be resolved and Shurberg will be assured of proper treatment before the FCC.<sup>1</sup>

The Court below correctly declared the "minority distress sale policy" to be unconstitutional as applied by

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<sup>1</sup> Shurberg emphasizes that its position has not changed with respect to the correctness of the determination below of the unconstitutionality of the "minority distress sale policy". Thus, if a writ of certiorari were to be granted, Shurberg would participate before the Court as a party-respondent in opposition to reversal of the decision below.

the FCC in its December, 1984 action involving Shurberg. The FCC had permitted Astroline to invoke the "minority distress sale policy", thus allowing Astroline to acquire the license of Station WHCT-TV, Hartford, Connecticut. In so doing, the FCC rejected Shurberg's claim for the right to compete for the facilities of that station. Concluding that the FCC's "minority distress sale policy" amounted to unconstitutional reverse discrimination, the majority of the Court below remanded the case to the FCC.

The decision of the Court below was issued on March 31, 1989. The FCC sought rehearing and rehearing *en banc*, both of which were denied by orders issued June 16, 1989. The FCC elected not to seek further review of the decision below, and in fact has opposed Astroline's petition for certiorari. The FCC has not sought a stay of mandate from the Court below.

Nevertheless, the FCC has yet to take any steps toward withdrawing the contested license from Astroline. As a result, the results of the unconstitutional agency action remain in place more than nine months after that action was first determined to be unconstitutional, and more than five years after the unconstitutional agency action was taken. More importantly, the FCC -- despite its election not to seek review by this Court of the decision below -- has *still* not acknowledged the correctness of that decision and has *still* not clearly and unequivocally announced that it is ready, willing and able to comply with that decision. Indeed, in its Brief in

Opposition to Astroline's Petition to this Court, the FCC assiduously avoids *any* direct statement concerning the substantive correctness of the decision below. To the contrary, the FCC appears to express sympathy for Astroline's "precarious" situation, FCC Brief at 19-20, and appears to leave open the possibility that future legislation could result in the reimposition of race-based policies such as the "minority distress sale policy", thereby affecting the resolution of this case, FCC Brief at 22.

The FCC's concern about Astroline's bankruptcy is curious. At the inception of this case before the Court below, Shurberg moved for a stay of the FCC's action in order to maintain the status quo ante. The FCC opposed Shurberg's motion, stating, *inter alia*, that

parties who act in reliance on agency decisions before they have become final and beyond . . . review by the courts do so at the risk that they may have to reverse that action. . . If the Commission's orders were to be reversed on appeal, whatever action was taken in reliance on the orders could and would be undone. If [Shurberg] should prevail on review, Astroline will be required to return the license to Faith Center.

FCC Opposition to Shurberg Emergency Motion for Stay at 4-5.<sup>2</sup>

In view of the FCC's representation to the Court below, the pendency of Astroline's bankruptcy should have no effect on this Court's disposition of Astroline's petition for certiorari. If that petition is denied (or if the decision below is ultimately affirmed by this Court), it is clear that the license at issue must be returned to its former owner, and Astroline will have no interest whatsoever in that license, regardless of its fate in the bankruptcy proceeding.<sup>3</sup> In that event, then, the

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<sup>2</sup> For its part, in its opposition to Shurberg's motion for stay, Astroline acknowledged and expressly accepted any such risk with the following language:

Astroline . . . incurs the entire risk of proceeding with the purchase and operation of [the station]. . . Astroline is willing to undertake the potential risk that it might suffer some economic loss should it not prevail on the appeal.

Astroline Memorandum in Opposition to Shurberg Emergency Motion for Stay at 14-15.

<sup>3</sup> As a practical matter, the license should *already* have been withdrawn from Astroline: neither the FCC nor Astroline has sought a stay of the effectiveness of the decision of the Court below. Nevertheless, the FCC has refused to honor its  
(continued...)

bankruptcy would be irrelevant to the issue now before this Court. And if this Court should grant Astroline's petition and reverse the Court below, then Astroline would theoretically be allowed to retain the license and to take all lawful actions it might choose in connection therewith. To the best of Shurberg's knowledge, Astroline has not indicated that it would seek to assign the station in that event, and any argument by the FCC based on the possibility of such an assignment is, at best, wholly unsupported speculation.

Shurberg is concerned that the FCC's failure unequivocally to commit to correcting the agency's unconstitutional action below, together with the FCC's apparent equivocation relative to the correctness of that decision, means that, notwithstanding that decision, Shurberg will continue to have to struggle to secure proper, Constitutional, treatment before the FCC.<sup>4</sup>

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<sup>3</sup>(...continued)

commitment to the Court below that "[i]f [Shurberg] should prevail on review, Astroline will be required to return the license to Faith Center". FCC Opposition to Shurberg Emergency Motion for Stay at 4-5.

<sup>4</sup> As an example of the FCC's apparent position in this regard, at Footnote 17 of its Brief in Opposition to Astroline's Petition, the FCC suggests that the decision below requires the FCC to "consider the interests" of Astroline in the license of  
(continued...)

Shurberg is a non-minority entity which has, for more than five years, litigated against a race-based policy which the FCC itself has expressly acknowledged lacks any supporting record as required by the Constitution. Despite the FCC's obvious enchantment with Astroline (if not with its own "minority distress sale policy"), and despite (or perhaps because of) the FCC's own refusal

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<sup>4</sup>(...continued)

Channel 18. But Astroline has no such interests: it acquired the license of that station pursuant to a policy which has been determined to have been unconstitutional; the FCC itself committed to withdrawing the license from Astroline if Shurberg should prevail in its appeal. And, while Astroline has certainly incurred a number of debts in connection with the station, Astroline itself assumed the risk of any such debts. Astroline's "interest" in the station is, therefore, immaterial here.

Shurberg's fear that the FCC will attempt simply to disregard the immateriality of Astroline's financial position is not unwarranted. The FCC has previously announced to the Court below that, even if the FCC were to determine that the "minority distress sale policy" lacked Constitutional support, the FCC intended nevertheless to permit Astroline to retain the station. FCC Report in Response to Remand. In other words, left to its own devices, the FCC apparently intends to leave in place the unconstitutional results of an unconstitutional policy, irrespective of Shurberg's contrary interests.

to announce and adhere to a single position with respect to that policy, Shurberg prevailed below. And despite that, it appears from the FCC's Brief to this Court that the FCC is *still* inclined to ignore the Constitution, the decisions of this Court, and the FCC's own representations to the Court below, in an effort to continue to leave in place the unconstitutional results of an unconstitutional policy.

Apparently, the FCC may still be unwilling to accept the essentially *color-blind* nature of the Constitution. If review of this case by this Court is necessary to provide to the FCC a clear, unequivocal, final statement concerning the unconstitutionality of the "minority distress sale policy" -- and, thus, to avert the need for any further struggle by Shurberg or any other non-minority victim of improper and unconstitutional governmental policies -- then Shurberg will not seek to oppose such review.

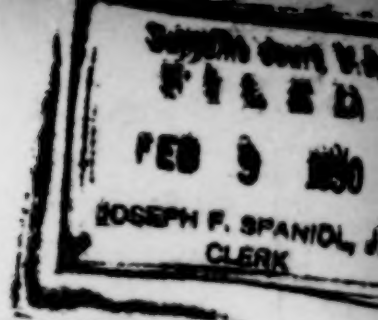
For the foregoing reasons, Shurberg Broadcasting of Hartford moves for leave to withdraw its Brief in Opposition to the Petition for Writ of Certiorari.

Respectfully submitted,

Harry F. Cole, *Counsel of Record*  
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(202) 296-4800

January 2, 1990

(6)  
No. 89-700



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner, -*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Respondent.*

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**JOINT APPENDIX**

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PETITION FOR CERTIORARI FILED OCTOBER 30, 1989  
CERTIORARI GRANTED JANUARY 8, 1990

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**CHRONOLOGICAL LIST OF  
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- Nov. 18, 1980 - Order and Notice of Apparent Liability adopted; designated BC 80-730 for hearing.
- Dec. 4, 1980 - Statement of Distress Sale Election and Motion to Hold Procedure in Abeyance filed by Faith Center, Inc. ("Faith Center"), at the Federal Communications Commission ("FCC").
- Feb. 20, 1981 - First Petition for Special Relief filed by Faith Center at the FCC.
- Dec. 22, 1981 - Faith Center's February 20, 1981 Petition for Special Relief is granted; and the proceeding is terminated by the FCC.
- Sept. 29, 1982 - Second Petition for Special Relief is filed by Faith Center at the FCC.
- Dec. 27, 1982 - Petition for Leave to Intervene and to Deny filed by Alan Shurberg at the FCC.
- Sept. 27, 1983 - Faith Center's September 29, 1982 Petition for Special Relief is granted and the proceeding is terminated by the FCC.
- May 14, 1984 - Petition for Leave to Intervene filed by Alan Shurberg and Shurberg Broadcasting of Hartford, Inc. ("Shurberg") at the FCC.
- June 25, 1984 - Third Petition for Special Relief filed by Faith Center at the FCC.

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- June 28, 1984 - Transfer Assignment Application filed by Faith Center at the FCC.
- Nov. 9, 1984 - Faith Center's June 28, 1984 Petition for Special Relief is granted; Faith Center and Astroline's June 28, 1984 Petition for Expedited Processing is granted by the FCC.
- Dec. 10, 1984 - Notice of appeal of an order of the FCC filed by Shurberg at the U.S. Court of Appeals for the D.C. Circuit ("Court").
- Dec. 10, 1984 - Emergency motion for stay filed by Shurberg at the Court.
- Dec. 11, 1984 - Memo from Associate General Counsel advising that on December 10, 1984, Shurberg filed with the Court a Notice of Appeal of the FCC's *Memorandum Opinion and Order*, (FCC 84-613), released December 7, 1984, in which the FCC granted the Petition for Special Relief of Faith Center.
- Dec. 13, 1984 - Notice of intention to intervene filed by Astroline at the Court.
- Dec. 21, 1984 - Per Curiam Order that the emergency motion for stay is denied.
- Feb. 21, 1985 - Brief filed by Shurberg at the Court.
- May 31, 1985 - Brief filed by Astroline at the Court.
- July 1, 1985 - Reply brief filed by Shurberg at the Court.
- July 12, 1985 - Final brief filed by Shurberg at the Court.
- July 15, 1985 - Brief filed by Astroline at the Court.

## JA-3

- July 29, 1985 - Brief filed by FCC at the Court.
- Dec. 27, 1985 - Supplemental brief filed by Shurberg at the Court.
- Jan. 8, 1986 - Reply to supplemental brief filed by Astroline at the Court.
- Jan. 8, 1986 - Argued before Wald, Silberman, CJs & MacKinnon, SCJ BIN.
- Sept. 18, 1986 - Court Clerk's order, on its own motion, that the FCC file a supplemental brief no later than 14 days from the date of this order addressed to the following question: In view of its position on the constitutionality of female and minority preferences is comparative hearings, as set out in *Steele v. FCC*, filed September 15, 1986, what is the agency's current position as to the constitutionality of its minority distress policy?
- Oct. 23, 1986 - Motion for remand filed by FCC at the Court.
- Jan. 2, 1987 - Letter from counsel for FCC advising of recent proceedings at the FCC and furnishing copies of the *Notice of Inquiry*.
- Jan. 23, 1987 - Court Clerk's order that the record is remanded for ninety (90) days, without extension, to permit the FCC to resolve its position with respect to the license at issue in this case. CJ Wald, Silberman, CJ and MacKinnon, SCJ.

- April 7, 1987 - Per Curiam Order denying FCC's motion for further remand or, in the alternative, to hold in abeyance and advising that the Court's Order of January 23, 1987 remains in effect. CJ Wald, Silberman, CJ and MacKinnon, SCJ.
- June 25, 1987 - Per Curiam Order that the record in this case is remanded for further proceedings.
- April 6, 1988 - Per Curiam Order that the Clerk is directed to file the motion of Shurberg and, that the motion of Shurberg is partially granted and the Court will proceed to render its decision on the merits of this case in the normal course of the business of the Court. CJ Wald, and Silberman, CJ; MacKinnon, SCJ.
- Oct. 3, 1988 - Per Curiam Order granting Shurberg's motion for leave to make informational submission and directing the Clerk to lodge the amicus curiae brief of the U.S. filed in No. 85-1755 & 85-1756, *Winter Park Communications, Inc. v. Federal Communications Commission*, and further ordering, *sua sponte*, that the FCC lodge with this Court its brief filed in 85-1755 & 85-1756, *Winter Park Communications, Inc. v. Federal Communications Commission*.
- March 31, 1989 - Opinion Per Curiam.
- March 31, 1989 - Separate Opinion filed by Circuit Judge Silberman.

- March 31, 1989 - Separate Opinion filed by Senior Circuit Judge MacKinnon.
- March 31, 1989 - Dissenting Opinion filed by Chief Judge Wald.
- March 31, 1989 - Judgment by the Court that the case is remanded to the FCC for further proceedings, in accordance with the Opinion for the Court.
- March 31, 1989 - Mandate order by the Court.
- May 15, 1989 - Petition for rehearing and suggestion for rehearing *en banc* filed by FCC.
- May 15, 1989 - Petition for rehearing with suggestion for rehearing *en banc* filed by Astroline.
- June 16, 1989 - Opinion Per Curiam. Statement of Chief Senior Circuit Judge MacKinnon attached.
- June 16, 1989 - Opinion Per Curiam. Statement of Chief Judge Wald, joined by Circuit Judge Robinson, Mikva, Edwards and Ruth B. Ginsburg attached.
- June 16, 1989 - Per Curiam Order denying the petitions for rehearing. Chief Judge Wald would grant the petitions for rehearing. Statement of Senior Circuit Judge MacKinnon is attached. CJ Wald, Silberman, CJ and MacKinnon, SCJ.
- June 16, 1989 - Order by the Court, *en banc*, that the suggestions for rehearing *en banc* are denied.
- July 12, 1989 - Mandate issued by the Court.

- Sept. 1, 1989 - Motion for Enforcement of Mandate filed by Shurberg at the Court.
- Sept. 11, 1989 - Opposition to Shurberg's Motion for Enforcement of Mandate filed by Astroline at the Court.
- Sept. 11, 1979 - Opposition to Motion for Enforcement of Mandate filed by FCC at the Court.
- Sept. 12, 1989 - Notice from Clerk's Office, U.S. Supreme Court that the Chief Justice signed an order extending the time within which to file a petition for a writ of certiorari to and including 10/29/89.
- Sept. 29, 1989 - Per Curiam Order that Shurberg's Motion For Enforcement of Mandate is denied by the Court.
- Nov. 9, 1989 - Notice from the Supreme Court of filing petition for certiorari.
- Jan. 9, 1990 - Letter from Supreme Court Clerk's Office enclosing order dated 1/8/90 granting petition for writ of certiorari.

**"Petition for Special Relief" filed with the Federal Communications Commission ("FCC") by Faith Center, Inc. ("Faith Center"), June 25, 1984**

#### DESCRIPTION OF THE PURCHASER

1. Astroline Communications Company is a Massachusetts limited partnership comprised of two General Partners and one Limited Partner.

A. Richard P. Ramirez, a Hispanic-American and experienced broadcaster, is a General Partner of Astroline Communications Company. He holds a twenty-one percent (21%) partnership interest in the limited partnership and will be the General Manager of the television station.

B. WHCT Management, Inc. ("WHCT Management") is a corporation duly organized under the laws of the State of Massachusetts and is also a General Partner in Astroline Communications Company. Presently, WHCT Management holds a nine percent (9%) partnership interest in the limited partnership. If, however, the Commission approves the proposed distress sale, WHCT Management will transfer four percent (4%), or four-ninths (4/9), of its nine percent (9%) interest in the partnership to additional minority personnel, preferably Blacks who will be involved in the day-to-day operation of the television station. Thus, pursuant to that transfer, the total minority equity interest in the partnership will be twenty-five percent (25%), with minorities controlling the station's daily operation.

C. The remaining partner in Astroline Communications Company is Astroline Company, a Massachusetts limited partnership. Astroline Company holds a seventy percent (70%) limited partnership interest in Astroline Communications Company and will not control the day-to-day operation of the station.

2. The chart set forth below describes each partner's financial interest and managerial control of Astroline Communications Company:

Richard P. Ramirez (21%)	General Partner	General Manager Full Operational Control
WHCT Management, Inc. (9%)*	General Partner	Limited Operational Control
Astroline Company (70%)	Limited Partner	No Operational Control

\* WHCT Management, Inc. will transfer four percent (4%) of its nine percent (9%) interest to minority personnel, if the Commission approves the distress sale of WHCT to Astroline Communications Company.

3. Astroline Communications Company is a qualified minority purchaser as defined by the Commission's *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 42 RR 2d 1689 (1978), as revised, 52 RR 2d 1301 (1982).

[W]here the general partner is a minority individual and owns more than a 20 percent interest in the broadcasting entity, there exists sufficient minority involvement to justify favorable application of the Commission's . . . distress sale policies.

*Id.* at 1305-06.

In accordance with the Commission's *Policy Statement*, the twenty-one percent (21%) interest in Astroline Communications Company held by Mr. Ramirez and his status as the General Manager surpasses the Commission's minimum standards. Additionally, minority ownership and control of Astroline Communications Company will increase when WHCT Management transfers four percent (4%) of its nine percent (9%) interest to additional minority personnel that will be interviewed and hired within 90 days following the consummation of the proposed distress sale.

Thus, Astroline Communications Company is a qualified minority purchaser as defined by the Commission because the total minority interest and control in Astroline Communications Company will be twenty-five percent (25%).

**"Comments in Opposition to Petition for Extraordinary Relief" filed with the FCC by Astroline Communications Company Limited Partnership ("Astroline"), July 23, 1984**

**The Transfer of the Station to ACC Pursuant to the Distress Sale is Appropriate in the Instant Proceeding**

The Commission specifically developed its distress sale policy to resolve cases such as the instant one. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 42 RR 2d 1689 (1978), as revised, 52 RR 2d 1301 (1982). The Commission's 1978 *Policy Statement* provided distress sale relief to a broadcast licensee whose renewal application had been designated for hearing. Under the 1978 *Policy Statement*, the Commission permits a broadcaster, whose license has been designated for revocation hearing, to dispose of his station through a distress sale if the purchaser is a qualified minority and the sale price is not more than seventy-five percent (75%) of the fair market value of the station.

The distress sale policy was formulated by the Commission to increase minority ownership of broadcast facilities. In an effort to encourage broadcasters to take advantage of this new policy, the Commission assured broadcasters that "applications by parties seeking relief under our . . . distress sale policies can be expected to receive expeditious processing."

In 1982, the Commission revised its earlier *Policy Statement* and released a new *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 52 RR 2d 1301 (1982). Among the revisions was a relaxation of the Commission's threshold requirements for approving distress sale petitions. In an effort to further increase the use of distress sales, the Commission broadened the distress sale policy to include limited partnerships that had control vested in a General Partner that was a minority citizen with at least a twenty percent (20%) equity interest in the station and operational control over the station's affairs. *Id.* at 1306.

In accordance with the Commission's 1982 *Policy Statement*, ACC is a qualified minority purchaser. See Attachment 1. The General Partner is a member of a minority group and owns more than a twenty percent (20%) equity interest in the broadcast entity. Richard P. Ramirez, a Hispanic-American and the controlling General Partner of ACC, holds a twenty-one percent (21%) ownership interest in the limited partnership and will run the day-to-day operation of the station. The other General Partner, WHCT Management, holds a nine percent (9%) partnership interest in the limited partnership. An additional four percent (4%) of WHCT Management's nine percent (9%) has been reserved for minority persons, preferably Black-Americans, that will be involved in the day-to-day management of the station. The remaining seventy percent (70%) interest in ACC is held by Astroline Company, a Limited Partner who will not be involved in the day-to-day operation of the television station.

Additionally, ACC proposes to purchase the station for \$3.1 million, a price which is far below seventy-five percent (75%) of the station's fair market value. Thus, the purchase price of the station is consistent with the Commission's distress sale policy.

In light of the financial problems encountered by the two earlier proposed assignees of WHCT-TV, ACC clearly demonstrated its financial qualifications. In a letter to Faith, the First National Bank of Boston documented ACC's ability to consummate the proposed transaction. See Attachment 2. Specifically, the letter stated that ACC has sufficient assets to cover both a cash payment to Faith of \$500,000 on the closing date and make payments on a ten-year note for \$2.6 million at a fixed interest rate of twelve percent (12%) per annum. The Bank later expanded its financial commitment to ACC in a letter that authorized the creation of a \$10 million line of credit for renovating and operating the proposed television station. See Attachment 3.

THE FIRST NATIONAL BANK OF BOSTON

DAVID K. MCKOWN  
First Vice President

May 15, 1984

Edward L. Masry, Jr., Esquire  
Counsel for Faith Center  
15495 Ventura Boulevard  
Sherman Oaks, CA 91403

Re: WHCT-TV, Channel 18, Hartford, Connecticut

Dear Mr. Masry:

We understand that you have requested verification of the financial qualifications of Astroline Company prior to entering into negotiations with them regarding the acquisition of the license and facilities of WHCT-TV, Channel 18 in Hartford, Connecticut.

The First National Bank of Boston has considerable experience working with Fred Boling and the other partners of Astroline. They have an excellent credit rating and relationship with our Bank. They also have honored all commitments that have been made to us in the past.

Upon review of Astroline's accounts with us, they have sufficient net liquid assets on deposit or readily available from other sources to cover the proposed transaction which involves a \$500,000 cash payment at closing to your client.

Assuming the discussions between your client and Astroline develop further, we are willing and prepared to work with you in the future to provide the additional information necessary to verify Astroline's financial qualifications. If you would like to discuss this matter in greater detail, please feel free to contact me.

Sincerely,

/s/ David K. McKown

"FCC Opposition to Emergency Motion for Stay" filed  
with the Court of Appeals by the FCC, December 14, 1984

WHY THE STAY SHOULD NOT BE GRANTED

A. The Balance of Equities Weighs Heavily Against  
Shurberg's Request for Stay.

Under *Holiday Tours* the decision whether to grant a stay or other temporary equitable relief will be based largely on the "balance of equities"—taking into account whether the movant has shown that without a stay it will be irreparably injured, whether a stay will harm other parties and whether the public interest favors or counsels against grant of a stay. 182 U.S. App.D.C. at 222, 559 F.2d at 844. In this case the balance of equities tips decidedly *against* staying the effectiveness of either the Commission order allowing the distress sale or its staff's order granting the actual assignment of license.<sup>5</sup>

1. Irreparable Injury

Shurberg has failed completely to demonstrate that it will suffer injury if the Commission action here is not stayed. And even if Shurberg's arguments could be deemed to show injury, that injury is not in any sense irreparable. Irreparable harm is the "sine qua non for the grant of such equitable relief." *Buffalo Forge Co. v. Ampco-Pittsburgh Corp.*, 638 F.2d 568, 569 (2d Cir. 1981). Shurberg's brief discussion of irreparable injury, buried deep in its 49-page motion, suggests only one basis for its claim of injury. Motion at 36-38. That appears to be that if the assignment is consummated,

Astroline will take Faith Center's place as licensee of the station, and Faith Center will simply

<sup>5</sup> As will be apparent, the same reasoning would also call for denial of a request for stay of any subsequent Commission order affirming its staff's action granting the assignment application.

go away insofar as the Hartford station is concerned. If SBH's appeal of the Commission's decision is successful and SBH is found by this Court to be entitled to comparative status as against Faith Center, the Commission will as a practical matter be unable to restore that right—obviously, if Faith Center is gone the Commission is going to be neither willing nor able to bring Faith Center back within its jurisdiction for the sole purpose of prosecuting a comparative proceeding for a broadcast license which Faith Center no longer holds. But that is the only way in which SBH could be accorded its rightful status, i.e., comparative status with Faith Center.

Motion at 36. Shurberg's argument reflects a total misunderstanding of what would happen in the unlikely event that it should prevail on appeal.

In the first place, Shurberg ignores the well established proposition that assignments consummated pending judicial review are contingent on the outcome of the review proceeding. The FCC has made clear in the past that parties who act in reliance on agency decisions before they have become final and beyond reconsideration by the Commission or review by the courts, do so at the risk that they may have to reverse that action. See *Teleprompter Corp.*, 50 Radio Reg. 2d (P&F) 125, 127 (CATV Bur. 1981); *Improvement Leasing Co.*, 73 F.C.C.2d 676, 684 (1979), *aff'd*, *Washington Ass'n for Television and Children v. FCC*, 214 U.S.App.D.C. 446, 665 F.2d 1264 (1981). If the Commission's orders were to be reversed on appeal, whatever action was taken in reliance on the orders could and would be undone. See *Virginia Petroleum Jobbers*, 104 U.S.App.D.C. at 112, 259 F.2d at 927. See also 47 U.S.C. 402(h).

If Shurberg should prevail on review, Astroline will be required to return the license to Faith Center. If the Com-

mission should be unable, as Shurberg asserts, "to bring Faith Center back within its jurisdiction" at that time, the obvious result will be that Faith Center will not be a competitor for renewal of the license. If Shurberg prevails on its theory that its December 1983 application is the only one entitled to comparative consideration and Faith Center is unwilling to appear and compete in a comparative renewal proceeding, it seems clear to us that Shurberg would, if it is qualified to be a broadcast licensee, obtain the license by default. If Shurberg is wrong in its speculation about what Faith Center would do in these circumstances, and if Faith Center did take the license back and actively participate in the comparative hearing, then Shurberg would have the comparison to which it asserts that it is entitled.

There is no basis to believe that if Shurberg should succeed on the merits of its appeal the Commission would be unable to provide it with complete relief—including vacating the grant of an assignment application if it had been done on the basis of order set aside on review. In either of the hypothetical cases noted above, we fail to see why these results would not provide a complete remedy that would totally vindicate Shurberg's interests and preclude any allegation of irreparable injury.<sup>6</sup>

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<sup>6</sup> Shurberg's argument (Motion at 37) that the Commission has sought "to 'co-opt' SBH's position before this Court by holding open the possibility of comparative consideration at some future date" is really beside the point. The nature of Shurberg's comparative rights, if any, will be decided on review when there is an appealable order. Whether Shurberg is found to be the only party who is entitled to compete for the application or whether the Commission can accept other competing applications, is immaterial to the clear fact that whatever comparative rights Shurberg is ultimately found by this Court to have, if any, they can be completely vindicated upon remand to the Commission following review. Pending judicial review, Shurberg has not shown any reason to foreclose Astroline from taking control of and operating the station.

**"Memorandum of Intervenor [Astroline] in Opposition to Appellant's Emergency Motion for Stay", filed with the Court of Appeals by Astroline, December 14, 1984**

**B. There is No Irreparable Harm to Shurberg if the Stay is Denied**

Shurberg must also establish that it will be irreparably harmed if a stay is not issued. Shurberg's entire irreparable injury argument, however, is based on the notion that it is currently entitled to protected status in an exclusive comparative hearing with Faith Center, *i.e.* it would be the only applicant entitled to participate in the hearing. At this point, however, Shurberg's asserted "right" is highly conjectural, if it exists at all. The Commission has already indicated that, if the distress sale to Astroline falls through, it will open the proceedings up to a full comparative hearing.

More important, were this Court to conclude that preservation of comparative considerations is of paramount importance in relation to the countervailing public interest factors relied on by the Commission in its MO&O, those considerations would compel the court to remand this case to the Commission to conduct an open comparative hearing. *New South* at 718. In this light, there clearly is no potential irreparable injury to Shurberg.

Shurberg's failure to properly challenge Astroline's qualifications in the proceeding below compels a conclusion that irreparable harm does not exist. The Commission's decision granting Faith Center's petition for special relief covers only one aspect of the distress sale. As noted above, Astroline filed its Transfer Assignment Applications with the Commission on June 28, 1984 which set forth Astroline's qualifications to become a licensee. Shurberg did not, however, oppose the application, despite its knowledge and its ability to do so. To the extent that Shurberg has lost any rights to challenge Astroline's qualifications to become a licensee in the distress sale that it may have had, it was

due to its own omission. Accordingly, Shurberg can not assent that it would be irreparably harmed by denial of its motion for a stay.

To the extent Shurberg is injured by the Commission action, it is because it will not receive the FCC license. But there is no judicial or administrative decision which holds that denial of the license constitutes irreparable injury justifying issuance of a stay. There is, of course, substantial authority to the contrary, including decisions of the Commission. In *Grand Broadcasting Company*, 4 Rad.Reg.2d (P&F) 205 (F.C.C. 1964), an unsuccessful applicant for a new television station license petitioned for a stay pending judicial review of the Commission's decision granting the license to a competing applicant. The Commission denied the stay, noting that "[t]he administrative proceedings have been concluded and the possible commencement or the pendency of a judicial review proceeding has not been considered a sufficient reason for staying the Commission's decision in these circumstances." *Id.* at 206. Accord *WHDH, Inc. (WHDH-TV)*, 23 Rad.Reg.2d (P&F) 914 (F.C.C. 1972) (fact that application for television license renewal was denied was not sufficient to show irreparable injury). Similarly, the grant of a NASA procurement contract to the lowest bidder has been held not to constitute irreparable injury to the losing bidders. *Floyd F. Miner Security Service, Inc. v. Paine*, 27 Ad.L.Rep.2d (P&F) 456 (D.D.C. 1970).

The facts in this case preclude a finding that Shurberg would be irreparably harmed if the stay is lifted. If Shurberg ultimately prevails on the merits on appeal, Astroline would be compelled to divest its interest in WHCT-TV. The station would then be made available to competing applicants and Shurberg would be free to compete. Astroline, not Shurberg, incurs the entire risk of proceeding with the purchase and operation of station WHCT-TV.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 84-1600

Shurberg Broadcasting of Hartford, Inc.,  
Appellant,  
v.  
Federal Communications Commission,  
Appellee  
Astroline Communications Company -  
Limited Partnership,  
Intervenor

United States Court of Appeals  
For the District of Columbia Circuit

FILED DEC 21 1984

GEORGE A. FISHER  
CLERK

Before: Wright, Bork and Mikva,\* Circuit Judges

ORDER

Upon consideration of Shurberg Broadcasting of Hartford, Inc.'s ("appellant" or "Shurberg") Emergency Motion for Stay and the oppositions and reply thereto, and the Federal Communication Commission's ("Commission") Motion to Dismiss and the opposition thereto, it is

ORDERED by the court that the Emergency Motion for Stay is denied.

In order to obtain a stay a party must 1) make a strong showing that it is likely to prevail on the merits of its appeal, 2) demonstrate that it will be irreparably injured if a stay is denied, 3) show that other parties will not be

substantially harmed by the issuance of the stay, and 4) demonstrate that a stay is in the public interest. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), citing *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). Although appellant "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation," *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953), appellant has failed to demonstrate that it would be irreparably injured in the absence of a stay, or that other parties and the public interest would not be harmed by the issuance of a stay.

Two scenarios are possible under the Commission's December 7, 1984 order. Either the distress sale between Faith Center, Inc. ("Faith Center") and Astroline Communications Company ("Astroline") will be consummated or a comparative hearing will be held between Faith Center, Shurberg, and any other applicants who file during the new ninety day "window". In either event, if Shurberg is ultimately successful on its appeal, the Commission could provide complete relief to Shurberg because the successful licensee would take the license subject to judicial review. See *Teleprompter Corp.*, 50 Rad. Reg. 2d (P&F) 125, 127 (CATC Bur. 1981); 47 U.S.C. § 402(h) (1982). See also *Grand Broadcasting Company*, 4 Rad. Reg. 2d (P&F) 205, 206 (F.C.C. 1964) (at conclusion of administrative proceedings unsuccessful applicant for new television station license denied stay because "possible commencement or the pendency of a judicial review proceeding has not been considered a sufficient reason for staying the Commission's decision in these circumstances"). Appellant's claim that it might be unable to meet the costs of pursuing the litigation simply does not amount to irreparable injury. See *Renegotiation Bd. v. Bannerkraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974) ("mere litigation expense, even substan-

tial unrecoupable costs, does not constitute irreparable injury"). Further, both Astroline's interest in consummating the transaction and the public's interest in ridding the Hartford area of a broadcaster of Faith Center's questionable reputation would likely be harmed by the issuance of the stay. Thus, although appellant may ultimately prevail on the merits of its appeal—a question which the court need not and does not reach at this stage—it has failed to satisfy the requirements for the issuance of a stay. It is

FURTHER ORDERED by the court that the Interim Stay issued on December 11, 1984 is vacated. It is

FURTHER ORDERED by the court that the Commission's Motion to Dismiss, filed December 14, 1984, is held in abeyance pending the response from appellant.

The Clerk is directed to transmit a certified copy of this order to the Federal Communications Commission.

*Per Curiam*

\* Circuit Judge Mikva did not participate in this order.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 84-1600

Shurberg Broadcasting of Hartford, Inc.  
v.

Federal Communications Commission

United States Court of Appeals  
For the District of Columbia Circuit

FILED SEP 18 1986

GEORGE A. FISHER  
CLERK

ORDER

It is ORDERED, by the Court, on its own motion, that the Federal Communications Commission file a supplemental brief no later than 14 days from the date of this order addressed to the following question:

In view of its position on the constitutionality of female and minority preferences in comparative hearings, as set out in its brief in *Steele v. FCC*, filed September 15, 1986, what is the agency's current position as to the constitutionality of its minority distress policy?

FOR THE COURT:  
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner  
Robert A. Bonner  
Chief Deputy Clerk

Letter to Honorable Mark S. Fowler, Chairman, Federal Communications Commission from Richard A. Hauser, counsel for Astroline, October 16, 1986, and accompanying four-page summary of WHCT programming

BAKER & HOSTETLER  
ATTORNEYS AT LAW  
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October 16, 1986

Honorable Mark S. Fowler  
Chairman  
Federal Communications Commission  
8th Floor  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: *Shurberg Broadcasting of Hartford, Inc. v. FCC*,  
No. 84-1600

Dear Mr. Chairman:

On behalf of Astroline Communications Company, I am pleased to forward the attached information for the Commission's consideration in its review of the constitutionality of the distress sales policy at the Federal Communications Commission as it was applied in the above-captioned case.

As you may recall, Astroline Communications Company purchased WHCT-TV from Faith Center, Inc. for \$3.1 million pursuant to the Commission's distress sales policy. Astroline took the station off the air and then later resumed full broadcast services on September 30, 1985, after expending approximately \$7 million to acquire new programming and renovate the studio and other facilities. A year has passed since then, and Astroline has continued

to inject private capital into the Hartford market and to date its total expenditures approximate \$17 million.

As a result of Astroline's acquisition of WHCT-TV, the citizens of Hartford have many program choices available to them that were not present during the term of the Faith Center license. Specifically, Astroline regularly broadcasts on WHCT-TV four (4) bilingual public affairs programs targeted towards the Hispanic community, three (3) weekly programs targeted towards the Black community, and other special programs for children. Very recently, Astroline was awarded the rights to broadcast games of the Hartford Whalers hockey team and the games of the University of Hartford basketball team. Attached is a summary of WHCT-TV's current program schedule. In total, these new programs have sparked growth, competition and diversity in the television marketplace in the Hartford-New Haven area.

We have taken the liberty of summarizing these points and the recent cases discussing the constitutionality of similar race-conscious programs in a statement in support of the distress sales policy and we have enclosed a copy for your review.

Very truly yours,  
/s/ Richard A. Hauser  
Richard A. Hauser

Attachments a/s

cc: Members of the Commission

Harry Cole, Esquire

Counsel to Shurberg Broadcasting of Hartford, Inc.

WHCT

18

HARTFORD NEW HAVEN

CHILDREN'S PROGRAMMING

"Romper Room"-Educational  
 "Polka Dot Door"-Educational  
 "Professor Kitzel"-Educational  
 "Dr. Doolittle"  
 "Hardy Boys"  
 "Top Cat"  
 "Fun World Of Hanna Barbera"  
 "Josie And The Pussycats"  
 "Lancelot Link"  
 "Rocky & Friends"  
 "Tennessee Tuxedo"

CHILDREN'S ANIMATED MOVIES

"Flame Over India"  
 "Hans Christian Anderson"  
 "Gregory's Girl"  
 "Aladdin And His Wonderful Lamp"  
 "The Golden Seal"  
 "Wonder Man"  
 "Treasure Train"  
 "Thief Of Bagdad"  
 "Slip Slide Adventures"  
 "Island Of Adventure"  
 "Crossbar"  
 "The Glacier Fox"  
 "The Adventures Of Curly And His Gang"  
 "Swan Lake"  
 "Tarka The Otter"  
 "Elephant Boy"

Since WHCT-TV18 signed on September 30, 1985, we have made a commitment to children's programming far dif-

ferent to commitments made by typical Independent television stations airing such programs as "G.I. Joe", "He-Man", "Transformers", "Gobots", "Voltron", etc. The management at WHCT-TV18 has taken a stand to air educational programs for children and more "wholesome cartoons". We have been in touch with Action for Children's Television (ACT) on many occasions for guidance in this effort. The only bona fide syndicated program that we have purchased has been "Brady Bunch", a perfect example of a typical American family and the problems and joys of raising six children.

We have made a commitment to air "Kidsworld", effective 10/6/86, which not only portrays children in a very positive light as scholars, but teaches them responsibility and discipline. WHCT-TV18's purchase of "The Children's Cinema Classics", which are scheduled during family viewing hours on Sunday, brings to parents the opportunity not only to let their children watch educational television, but also to watch television with their kids as a family. Every program has an important message.

"Zoobilee Zoo" with Ben Vereen is another example of our commitment to enhance the quality of children's programming to our viewers, every day leaving our youngsters with an important message not only through words but also through music.

MINORITY PROGRAMS

- "Julia" - the story of a single black mother and her son experiencing the hardships of growing up.
- "Soul Train" - A weekly music program focusing on the latest from the "Soul" charts.
- "Essence, The Television Program" - a weekly half-hour magazine-format program with hosts Susan Taylor and Jose Luciano featuring interviews with major Black celebrities.

- "Carrascolendas" - A program aimed toward Hispanic children to affirm their cultural values. This all takes place in the magical town called "Carrascolendas".
- "Sonrisas" - A program for all ages. The show deals with everyday problems experienced by children and adolescents of various hispanic cultures.
- "Villa Alegre" - Uses a magazine format that blends live characters, film and animation to present a wide-ranging and challenging curriculum to youngsters of all social backgrounds.
- "Que Pasa, U.S.A." - A program about a three-generation Cuban-American family trying to bridge the generation gap.
- Reverend Price Religious Service - A weekly service broadcast on Sunday morning.

Not only has WHCT-TV18 made a commitment to minority programming airing the only regularly scheduled bilingual programs in the state of Connecticut, but during the month of January 1986 WHCT-TV18 aired a six-part special entitled "Martin Luther King". WHCT-TV18 has also aired such specials as:

- "Best Of The Superfest" - A kick-off of a series of concerts benefiting the United Negro College Fund. Hosted by Lou Rawls.
- "Essence: Television Superstars"
- "Essence: Music's Black Superstars"

During the month of February 1986, as a celebration of "Black History Month", WHCT-TV18 undertook a project to feature famous black artists and aired 60-second spots for the entire month, as a tribute to these fine leaders. As a tribute to black entertainers, for the entire month of February WHCT-TV18 aired movies featuring such stars as Harry Belafonte, Ruby Kieler, Ozzie Davis, Flip Wilson, Sammy Davis, Jr., Sidney Poitier, Lena Horne, James

Brown, Cab Calloway, Ben Vereen, Julius Erving, Meadowlark Lemon. Not only does WHCT-TV18 have a strong commitment to minority programming now and for years to come, but it also includes a commitment to the airing of Public Service Announcements in Spanish as well. WHCT-TV18 is the only television in the state of Connecticut that has made a significant contribution to the Hispanic community.

### LOCALLY PRODUCED

In the short year that WHCT-TV18 has been on the air, we have made great progress in the production of locally produced programs such as:

- *The Hartford Whalers* - The only professional sports franchise in the state of Connecticut. Twenty-four games produced by WHCT-TV18 for the 1986-1987 season.
- *University of Hartford Hawks* - Eleven basketball games being produced by WHCT-TV18 for the 1986-1987 season.
- *Pepsi Duckpin Challenge* - A weekly hour of exciting bowling action sponsored by the Connecticut Bowlers Association.
- *One Goal Away* - a half-hour special featuring the Hartford Whalers.

WHCT-TV18 airs more local sports than any other television station in the state of Connecticut.

Not only does WHCT-TV18 produce local sports, but also, in conjunction with the Archdiocese of Hartford, produces a live mass, every day, Monday through Friday 9:00AM-9:30AM for our own television studios. I believe that this is the only mass being aired "live" in the country.

### MISCELLANEOUS PROGRAMS

Not only has WHCT-TV18 made a commitment to children's programming, minority programs, and local pro-

grams, and local programming, but in order to keep our viewing audience informed on the latest news around the world during the past year, we have acquired the rights to such programs as:

- Independent Network News - daily news service
- CNN Headline News - 24-hour news service
- AGDAY - daily agricultural news service
- Ask Washington - a daily call-in dialogue between today's leaders and TV viewers nationwide, covering topics ranging from money matters and medical care to the latest in business and political trends.
- Wall Street Journal Report - A weekly half-hour program featuring reports on people, technology, financial matters, and a look at changing America.

**BEFORE THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

\_\_\_\_\_  
**Case No. 84-1600**  
\_\_\_\_\_

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee,*

and

ASTROLINE COMMUNICATIONS COMPANY,  
*Intervenor.*

**MOTION OF INTERVENOR ASTROLINE  
COMMUNICATIONS COMPANY LIMITED PARTNERSHIP  
TO SUPPLEMENT THE RECORD**

Astroline Communications Company Limited Partnership ("Astroline"), through counsel, hereby files this Motion to Supplement the Record with the attached letter to Mr. William J. Tricarico, Secretary, Federal Communications Commission, dated October 16, 1986.

The letter updates the Federal Communications Commission on the operation of WHCT-TV (Channel 18), Hartford, Connecticut. As was noted in an earlier supplement filed over a year ago on October 23, 1985, the station went off the air to upgrade its facilities and acquire new programming, and then returned to the air on September 30, 1985, with a full 18 hours program schedule. Since returning to the air over a year ago, Astroline has spent an additional ten million dollars (\$10,000,000.00) and done a lot to diversify the programming choices available to the

viewers in the Hartford area. In view of the inordinate delay in resolving this litigation and the current inquiry concerning the constitutionality of the Commission's distress sale policy, the record before this Court would be incomplete and inaccurate unless it also included WHCT-TV's recent record of broadcast service and operation.

Respectfully submitted,

/s/ Thomas A. Hart, Jr.

Thomas A. Hart, Jr.

Lee H. Simowitz

BAKER & HOSTETLER

1050 Connecticut Avenue, N.W.

Suite 1100

Washington, DC 20036

(202) 861-1500

Attorneys for Intervenor Astroline  
Communications Company Limited  
Partnership

Date: October 16, 1986

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WASHINGTON SQUARE, SUITE 1100  
1050 CONNECTICUT AVE., N.W.  
WASHINGTON, D.C. 20036  
(202) 861-1500**

**October 16, 1986**

*BY HAND*

Mr. William J. Tricarico

Commissioner

Federal Communications Commission

1919 M Street, N.W., Room 222

Washington, D.C. 20554

**Re: Status Report of WHCT-TV (Channel 18); Hartford, Connecticut**

Dear Mr. Tricarico:

Astroline Communications Company Limited Partnership ("ACC"), through counsel, hereby updates its earlier letter to you, dated September 30, 1985, regarding the status of WHCT-TV (Channel 18), in Hartford, Connecticut. As you may recall, Astroline purchased WHCT from Faith Center, Inc. pursuant to the FCC's Distress Sale Policy on January 23, 1985. Astroline then took the station off the air and resumed full-time broadcast on WHCT on September 30, 1985. At that time, Astroline had expended approximately \$7 million in renovating the station and acquiring programming.

We are pleased to inform you that Astroline recently celebrated its first anniversary of full-time broadcast service on WHCT. Astroline has completed its studio renovation and has developed a full film library of top quality programs. Over the past year, Astroline has done much to diversify the programming currently available in the Hartford community.

The programming of Astroline over the past 12 months, as the new licensee of WHCT-TV, Hartford, Connecticut, show, in this case, that minority ownership leads to diversity of programming. Although 20.4% of the Hartford community is Hispanic, until Astroline became the licensee of WHCT-TV, no television station aired regularly scheduled bilingual programs in the State of Connecticut. WHCT-TV is committed to airing bilingual programming and already regularly broadcasts four scheduled bilingual programs: "Carrascolendas," a program aimed toward Hispanic children; "Sonrisas," a program that deals with everyday problems experienced by children and adolescents of various Hispanic cultures; "Villa Alegre," a magazine format program that blends live characters, film and animation to present a wide ranging and challenging curriculum to youngsters of all social backgrounds; and "Que Pasa, USA," a program about a three-generation Cuban-American family trying to bridge the generation gap.

WHCT-TV is also committed to providing minority programming in general, since, in addition to the Hispanics in Hartford, 33.9% of the population in the Hartford area is Black. WHCT-TV regularly broadcasts "Julia," the story of a single Black mother and her son experiencing the hardships of growing up; "Soul Train," a weekly music program focusing on the latest from the soul charts; and "Essence, The Television Program," a weekly half-hour magazine format program featuring interviews with major Black celebrities. Also, WHCT ran various specials throughout the year that focused on minority individuals or organizations. WHCT-TV has also increased diversity and competition in non-minority programming, by airing special children's and sports programming. The station airs more local sports than any other television station in the State of Connecticut. WHCT-TV's sports programming includes broadcasting the Hartford Whalers' hockey games; the University of Hartford Hawks' basketball games; and the Connecticut Bowlers Association's games. In addition,

WHCT-TV has produced a half-hour special featuring the Hartford Whalers. Thus, the distress sale of WHCT-TV in Hartford, Connecticut, has led to increased competition and diversified programming in the Hartford area.

The initial staff referred to in our September 30, 1985 letter has grown to over forty employees and Astroline has continued its record of employing women and racial minorities in senior management positions.

Since January 1985 Astroline has now expended in excess of \$17 million in private capital through its first year of operation. The construction permit referred to in the earlier letter has been granted by the Commission and Astroline has begun constructing a \$2.7 million 1300-foot tower to further enhance its ability to serve the citizens of the Hartford area. If you have any questions concerning this letter, please contact the undersigned.

Sincerely,

/s/ Thomas A. Hart, Jr.  
Thomas A. Hart, Jr.

Before the  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—  
Case No. 84-1600  
—

SHURBERG BROADCASTING OF HARTFORD, INC.  
*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee.*

ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,  
*Intervenor*

CONTINGENT MOTION OF SHURBERG BROADCASTING  
OF HARTFORD, INC. FOR LEAVE TO SUBMIT  
COMMENTS

Appellant Shurberg Broadcasting of Hartford, Inc. ("SBH") hereby moves, on a contingent basis, for leave to submit the following comments relative to the "Motion of Intervenor Astroline Communications Company ["Astroline"] to Supplement the Record". Astroline's Motion was filed with the Court on October 17, 1986.

As set forth in SBH's Opposition to Astroline's Motion, which is being filed simultaneously herewith, SBH believes that Astroline's Motion is completely unwarranted and, indeed, inappropriate, and that it should be denied. If the Court agrees with SBH and rejects Astroline's Motion, then SBH will withdraw the instant Motion and no further consideration need be given to it. However, if the Court disagrees with SBH with respect to Astroline's Motion, SBH submits that, at a minimum, SBH is entitled to address the substance of Astroline's Motion (and the letter

accompanying it) in order to place it in an objective and meaningful context. The following comments are intended for that purpose.

In its Motion, Astroline alleges that, since September 30, 1985, it has spent ten million dollars and "done a lot to diversify the programming" available in the area of Hartford, Connecticut.<sup>1</sup> In the letter accompanying the Motion, Astroline's counsel offers a variety of allegations concerning Astroline's employment practices since September 30, 1985, Astroline's investment in station operations since that same date, the programming which Astroline airs, and the programming otherwise available to the Hartford audience.<sup>2</sup>

**Astroline's Employment Practices**

This proceeding involves the validity of a Commission action taken almost two years ago. It has been fully briefed and argued by all parties; indeed, oral argument was held more than nine months ago. At no point in the Commission's Memorandum Opinion and Order below, or in any of the pleadings or oral presentations of SBH, the Commission or any other party before this Court, has it been suggested that Astroline's employment practices, or employment practices in general in the broadcast industry, have any relevance whatsoever to this proceeding.

It should also be noted that, to the extent that Astroline makes claims concerning its own record of employing minorities, SBH is willing to commit that, within two years of obtaining the Station WHCT-TV license, it will be able

<sup>1</sup> As the Court is aware, this case involves contested claims to the license of Station WHCT-TV, Hartford, Connecticut.

<sup>2</sup> Astroline offers no supporting declaration or affidavit relative to the various allegations set forth in its Motion and accompanying letter. Attached hereto is a Declaration, prepared under penalty of perjury, in support of the factual statements made in SBH's instant Contingent Motion.

to make the same claims relative to minority representation at all levels of station employment.

### **Astroline's Investment**

The question of Astroline's investment, and the potential loss thereof, has been specifically foreclosed from consideration herein. Immediately following the Commission's action granting Astroline's application to purchase Station WHCT-TV, SBH requested that this Court stay the effectiveness of that action. SBH argued in part that unless a stay were granted, Astroline might choose to close the sale. In that event, SBH asserted in support of its stay request, Astroline might suffer significant harm:

Astroline has indicated that it intends to make substantial improvements to the station at significant costs over and above the station's purchase price. Any such costs it might incur would presumably be non-compensable (although Astroline would, again presumably, be able to sell off, possibly at a loss, any equipment it might obtain). In view of these factors, it appears to be in Astroline's interest to await the outcome of SBH's appeal before going forward.

### **SBH's Emergency Motion for Stay at 41-42.**

In response to SBH's motion, the Commission asserted that SBH was suffering from a "total misunderstanding of what would happen" if SBH were to prevail on appeal. At page 4 of its Opposition to SBH's Motion the Commission stated:

The [Commission] has made clear in the past that parties who act in reliance on agency decisions before they have become final and beyond reconsideration by the Commission or review by the courts, do so at the risk that they may have to reverse that action. . . . If the Commission's orders were to be reversed on appeal, whatever action was taken in reliance on the orders could and would be undone.

If [SBH] should prevail on review, Astroline will be required to return the license to Faith Center.

*Id.* at 4-5 (citations omitted).

For its part, Astroline addressed SBH's argument as follows:

If [SBH] ultimately prevails on the merits on appeal, Astroline would be compelled to divest its interest in WHCT-TV. . . . Astroline, not [SBH], incurs the entire risk of proceeding with the purchase and operation of station WHCT-TV.

\* \* \*

[SBH]'s paternalistic argument that a stay will protect Astroline's interest by mitigating the potential need to "unscramble the egg" is disingenuous, at best. . . . Astroline desires to consummate the purchase as soon as possible. In so doing, Astroline is willing to undertake the potential risk that it might suffer some economic loss should it not prevail on the appeal.

Memorandum of Intervenor [Astroline] in Opposition to Appellant's Emergency Motion for Stay at 14-15.

The Court denied SBH's Emergency Motion for Stay by Order filed on December 21, 1984. It stated that "if [SBH] is ultimately successful on its appeal, the Commission could provide complete relief to [SBH] because the successful licensee would take the license subject to judicial review." Order at 2.

Thus, it is clear that Astroline's potential exposure to significant losses if it chose to close prior to resolution of this appeal was squarely raised by SBH, addressed by the Commission and Astroline, and resolved by the Court. Astroline explicitly and expressly acknowledged that it "was willing to undertake the potential risk" that it might suffer

economic loss by purchasing the station prior to final resolution of SBH's appeal. Astroline's post-closing expenditures are therefore totally irrelevant to this proceeding.

And even if Astroline had not clearly conceded that any *post hoc* investments it might make would be made at its own risk, it must further be noted that the question of investment in station operations was not addressed in the Commission's Memorandum Opinion and Order below, and it has not been advanced in support of the Commission's action by any party hereto. It is, therefore, completely irrelevant to this proceeding.

### Programming

The question of programming as a general concept may be relevant to this proceeding. Both before the Commission and before this Court, SBH has consistently challenged the validity of the Commission's "distress sale policy". The Commission and Astroline have both defended that policy on the theory that a race-based policy intended to increase the level of minority ownership in the broadcast industry will perforce lead to increased representation in the broadcast media of the "views of racial minorities." See Commission *MO&O*, J.A. I at 6; see also Commission Brief at 29-32 ("[T]he minority ownership policies are based principally on the Commission's authority . . . to encourage diversity of programming. . ."); Astroline Brief at 26-39.

Recently, however, the Commission submitted a brief to this Court in *Steele v. FCC*, Case No. 84-1176, in which it has expressly disavowed that position. There the Commission expressly stated that

First, no record has been established demonstrating that a race- or gender-based preference scheme to increase minority and female ownership is essential to achieving th[e] objective [of expanding diversity of broadcast programming]. . . . Second, no record has been established on which to base an assumption that

a nexus exists between an owner's race or gender and program diversity.

Commission Brief in *Steele v. FCC* (rehearing *en banc*), at 19. The Court in the instant proceeding has ordered the Commission to submit a supplemental brief in this case discussing the constitutionality of the "distress sale policy" in light of the position taken in the *Steele* brief.

SBH suspects that Astroline's goal in submitting its letter to the Commission and to the Court was to create some basis for an argument that the Commission's action below did in fact enhance diversity of programming. Such an argument is otherwise completely unavailable to Astroline, since the Commission has, in *Steele*, acknowledged that it had no general record support for its position, and further since the specific record which was before the Commission at the time it acted in this proceeding was devoid of any information concerning Astroline's actual or proposed programming. Thus, Astroline is apparently seeking anticipatorily to shore up its now-unsupported position.

As a threshold matter, SBH takes exception to Astroline's attempt to develop a supporting record almost two full years *after* the Commission's *MO&O* under review here. Of course, an agency decision must be sustainable, if at all, on the basis of the record before the agency at the time it made its decision, and not some new record made in the reviewing court. *E.g.*, *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976); *Motor and Equipment Manufacturers' Association, Inc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (MacKinnon, J.). Thus, Astroline's description of programming which it did not even begin to broadcast until ten months *after* the Commission's decision cannot properly be considered here.

But even if Astroline's *post litem motam* programming is considered, it is clear that that programming affords no support for the claim that the "distress sale policy" will

create diversity of programming. To the contrary, Astroline's showing demonstrates the *invalidity* of that claim.

Astroline first claims that, prior to January 24, 1985, "no television station aired regularly scheduled bilingual programs in the State of Connecticut." Astroline Letter at 1. If Astroline intends this to mean that only English-language programming was available over-the-air to Hartford-area television viewers prior to that date, Astroline is factually wrong. Channel 47, Hartford, has been providing full-time Spanish-language television programming to Hartford for some five years or more. Further, Channel 13, also licensed to Hartford, has recently commenced operation and is also providing substantial blocks of Spanish-language programming amounting to approximately five hours per day. Additionally, Channel 30 and Channel 61—both of which are licensed to Hartford—provide both English- and Spanish-language programming to the Hartford area. Thus, even if Astroline does now provide some limited, non-local Spanish-language programming, such programming is already otherwise available to the Hartford audience, and it cannot accurately be said that Astroline is contributing in any unique way to the diversity of available programming. This is especially so where the Spanish-language programs broadcast by Astroline do not appear to be locally-produced and, instead, appear to be syndicated programming generally available to any broadcast licensee, whether or not minority-controlled.

Second, Astroline points with apparent pride to its "minority programming", by which it apparently means programming of particular interest to Blacks. As an initial, conceptual, matter, this aspect of Astroline's presentation effectively undermines the traditional argument in support of the "distress sale policy". After all, if a company purportedly controlled by a Hispanic individual can provide programming of particular interest to Blacks, why should not a non-minority licensee be expected to be able to do precisely the same? In other words, the notion that "mi-

nority ownership leads to peculiarly minority programming" appears to hold water, if at all, only when the minority group to which the station's owner belongs happens to be the group to which the station's programming is directed. As soon as it is acknowledged that an owner of a particular racial or ethnic heritage is capable of providing programming for an audience of a separate racial or ethnic heritage, then the basic underpinning of any minority ownership preference disintegrates.

But even more surprising is the particular "minority programming" to which Astroline points: "Julia", "Soul Train", and "Essence, The Television Program". "Julia" is a syndicated program first produced by 20th Century Fox for broadcast on the NBC Television Network from September, 1968 to May, 1971. Thus, it is not a program locally produced by Astroline. It is not a program produced by a minority-owned company. And it is a program which was broadcast on a national network, irrespective of whether the network affiliates were controlled by minorities or non-minorities. As a result, it is difficult to fathom how the broadcast of "Julia" can be seen to result in any minority-related diversity which could not have been accomplished by, for example, a grant of SBH's application. It is even more difficult to fathom how the broadcast of "Julia" is supportive of the "distress sale policy" in light of the fact that the program was first produced, and broadcast nationally, more than seven years *before* the creation of the "distress sale policy".

"Soul Train" is a music and dance program akin to "American Bandstand". Again, it is not locally produced by Astroline. While it may be produced by a minority-owned company, it is difficult to claim that its "content" is of peculiar interest to Blacks. The audio "content" of the program consists almost exclusively of popular music, and the video "content" consists of young people dancing to that music. While the majority of dancers and recording artists featured on the program may be Black, it is difficult

to understand why this program should be perceived as being of any peculiar or particular interest to minorities. Any possible explanation (*e.g.*, "Blacks have a heightened interest in popular music and dance") would arise more from a simplistic, and distasteful, racial stereotype than from any valid and defensible consideration.

"Essence, The Television Program" is described by Astroline as being a weekly half-hour "magazine format program featuring interviews with major Black celebrities." Again, the program is not locally produced by Astroline. There is no indication whatsoever that this is anything more than an entertainment program which focusses on Black celebrities, celebrities who would very likely be of equal interest to Blacks and non-Blacks. There is no indication whatsoever that this program would not be both available to and broadcast by non-minority licensees.

Astroline also touts its sports programming. Quite frankly, SBH understands the Court's and the Commission's historical interest in "diversity of programming" to entail something more than professional hockey games, college basketball games, and bowling matches entitled "Pepsi Duckpin Challenge", even if such programming were not otherwise abundantly available.<sup>3</sup> To the extent that Astroline is forced to rely on such programming in support of its claim that it has "done a lot to diversify programming choices", SBH submits that SBH could, and would, commit itself to providing at least as much diversity, and probably significantly more.

<sup>3</sup> It goes without saying that even a cursory scanning of network television listings demonstrates the plethora of sports programming already available nationally.

Respectfully submitted,

/s/ Harry F. Cole

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Counsel for Shurberg Broadcasting  
of Hartford, Inc.

Drafted: October 21, 1986

Filed: October 23, 1986

## DECLARATION

Alan Shurberg, under penalty of perjury, hereby declares the following to be true and correct of his own personal knowledge:

1. I am the sole stockholder, officer and director of Shurberg Broadcasting of Hartford, Inc., the Appellant in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, Case No. 84-1600, which is presently pending before the United States Court of Appeals for the District of Columbia Circuit. I am preparing this Declaration for submission to the Court in connection with a Contingent Motion of Shurberg Broadcasting of Hartford, Inc. for Leave to Submit Comments ("Contingent Motion").

2. I have reviewed the Contingent Motion and I hereby affirm that the factual statements set forth therein are true and correct.

/s/ Alan Shurberg  
Alan Shurberg

Date: 10/22/86

ORAL ARGUMENT HELD ON JANUARY 8, 1986  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
No. 84-1600  
\_\_\_\_\_

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION  
*Appellee*  
ASTROLINE COMMUNICATIONS CO.,  
*Intervenor*

## MOTION FOR REMAND

Appellee Federal Communications Commission respectfully moves the Court to remand the record in the captioned case for further consideration in connection with the Court's recent remand in *Steele v. FCC*, No. 84-1176.

Appellant in this case seeks review of a Commission order authorizing a "distress" sale of a television station to a minority controlled buyer. Under the distress sale policy only certain persons or companies, namely members of certain minority groups and certain minority-controlled companies, are eligible to buy a station. *See Policy On Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978); *Minority Ownership In Broadcasting*, 92 F.C.C.2d 849 (1981). Appellant in this case has challenged the constitutionality of this policy.

In its brief on rehearing *en banc* in *Steele v. FCC*, the Commission asked the Court to remand for further consideration of both racial and gender preferences utilized in the Commission's comparative licensing process. The

Commission explained that as it understood recent Supreme Court decisions, racial and gender preferences are constitutionally suspect and must be based on an exceedingly persuasive justification, which requires that a factual record be established. The Commission concluded that in the case of comparative preferences based on race and gender, it had never conducted a factual inquiry to ascertain whether there was a nexus between preferences and diversity of programming. The Commission announced that if the Court were to remand in *Steele*, it intended to institute a proceeding to collect evidence and examine this issue. See *Public Notice*, FCC 86-387 (Sept. 15, 1986). On October 9th, the Court issued an order of remand in *Steele*.

The distress sale policy raises many of the same questions that are present in the *Steele* case. Because the Commission now intends to undertake a proceeding to ascertain whether there is an adequate justification for the policy of granting comparative preferences based on race and gender, it seems appropriate also to reexamine the justifications for the distress sale policy.

The Commission understands that intervenor Astroline, the distress sale buyer in the present case that is currently operating the station, has made a substantial financial commitment toward facilities and programming to provide service to the community. Because of this good faith reliance on the policy and the present uncertainty in this area, it appears appropriate to maintain the status quo in this case pending further developments. Therefore, unless otherwise instructed by the Court, upon remand the Commission proposes to allow Astroline to continue to operate the station during the inquiry that will be conducted.

In consideration of the foregoing, we respectfully move the Court to remand the record in the captioned case for further consideration.<sup>1</sup>

<sup>1</sup> In an order of September 18, 1986, the Court directed that the

Respectfully submitted,

Jack D. Smith,  
General Counsel

Daniel M. Armstrong,  
Associate General Counsel

Federal Communications Commission  
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October 23, 1986

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Commission file a supplemental brief in this case indicating its current position as to the constitutionality of the distress sale policy. This pleading is intended to reflect the Commission's current position as to the distress sale policy, and we ask the Court to accept this pleading in lieu of a supplemental brief.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

—  
**MM Docket No. 86-484**  
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In the Matter of

Reexamination of the Commission's  
Comparative Licensing, Distress  
Sales and Tax Certificate Policies  
Premised on Racial, Ethnic or Gender  
Classifications

**NOTICE OF INQUIRY**

**Adopted: December 17, 1986;  
Released: December 30, 1986**

By the Commission: Commissioner Quello issuing a separate statement.

**INTRODUCTION**

1. Over the past decade, the Commission has administered three regulatory policies designed to achieve diversity in broadcast programming by fostering an increase in the number of broadcast facilities owned by minority group members and women. These policies are, first, the application of racial, ethnic, and gender preferences in comparative licensing proceedings for broadcast stations; second, the administration of the Commission's distress sale policy to permit minority acquisition of broadcast stations designated for hearing on basic qualifications issues; and third, the issuance of tax certificates for sales of broadcast properties to minorities. This proceeding was prompted by concerns as to the continuing legality of these

policies as a result of the *Steele* case<sup>1</sup> and several recent Supreme Court cases. The Commission asked for a remand in order to determine whether a record can be established that would support the constitutionality of its preference scheme. The Commission also has decided that this is an appropriate occasion to determine whether comparative preferences, distress sales and tax certificates are appropriate as a matter of policy.

**BACKGROUND**

**A. Comparative Preference Policies for Minorities and Women.**

2. In a comparative licensing proceeding, the Commission selects the applicant best able to serve the public interest. See, e.g., *Johnston Broadcasting v. FCC*, 175 F.2d 351 (D.C. Cir. 1949). To make this choice, the Commission has set out standard criteria to be considered in every comparative proceeding. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) [hereafter *1965 Policy Statement*]. The Commission explained in the *1965 Policy Statement* that there are two principal objectives on which it would focus in selecting among qualified applicants: (1) best practicable service to the public; and (2) maximum diffusion of control of the media of mass communications, generally referred to as diversification, in order to maximize diversity of programming. *Id.* at 394. See generally *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 603-07 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1392 (1985). Integration of ownership and management is the single most important factor in evaluating best practicable service. Certain qualitative attributes of participating owners, such as local residence, participation in civic activities and broadcast experience have been used to enhance integration credit. *Id.* at 395-96.

<sup>1</sup> *Steele v. FCC*, Case No. 84-1176 (D.C. Cir. motion for remand granted Oct. 9, 1986).

3. Minority and female ownership were not specifically addressed in the 1965 *Policy Statement*. Instead, the Commission's current comparative preference policies had their origin in the Court of Appeals decision in *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). See also *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975). In *TV 9*, the Court stated that "we hold that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." The Court, however, reversed the Commission's decision that minority preferences should be granted only after the minority applicant demonstrated a nexus to program diversity. The court concluded that it could be assumed that minority ownership would foster program diversity when there is integration of ownership and management. It therefore found that the Commission should have awarded merit to the minority owner in *TV 9* without first requiring a demonstration of a nexus between minority ownership and increased program diversity.<sup>2</sup> In 1975 in *Garrett*, the court clarified its *TV 9* holding, stating that the "entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of black citizenry and that 'reasonable expectation' without 'advance demonstration' gives them relevance." *Id.* at 1063. See also *West Michigan Broadcasting Co.*, 735 F.2d at 606-616. Based on these directives from the court, the Commission concluded that minority ownership and participation should receive credit in the comparative process; it decided to treat this factor as an enhancement to the standard comparative criterion of integration of management, an element used to evaluate which competing ap-

<sup>2</sup> For the Commission's decision, see *Mid - Florida Television Corp.*, 33 FCC 2d 1, 17-18 (Rev. Bd.), *rev. denied*, 37 FCC 2d 559 (1972). Unless modified otherwise, references to "diversity" herein refer to program diversity.

plicant is likely to provide the best practicable service to the public. *WPIX, Inc.*, 68 FCC 2d 381 (1978).<sup>3</sup>

4. In a subsequent decision, the Commission's Review Board applied the preference policy to women, concluding that "merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation, but that it is a merit of lesser significance." *Mid - Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (1981). Finding the rationale of *TV 9* and *Garrett* applicable to women as well, the Board concluded that, if it were correct to assume that minority ownership promotes diversity, then the goal of diversification of programming would by the same logic likely be furthered by a policy that gives some comparative credit for female ownership of broadcast stations, given that women, like minorities, were infrequent owners of broadcast operations. However, based on the observation that women, unlike minorities, had not been "excluded from the mainstream of society" due to prior discrimination, the merit accorded integrated female ownership is of lesser weight than that awarded minority ownership.<sup>4</sup> The Board followed the court's ruling in *TV 9* and did not require a showing of a nexus between female ownership and program diversity before awarding the preference.

5. Minority and female preference policies have been applied in numerous cases. In *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643 (Rev. Bd. 1983), *reconsid. denied*, 94

<sup>3</sup> The *TV 9* opinion and supplemental opinion were careful to point out the difference between a "preference," which the court viewed as determinative *per se*, and an "enhancement" or "merit," which was not. The Commission's implementation of the *TV 9* order in the *WPIX* case was intended to observe this distinction. For ease of discussion herein, the term "preference" shall be deemed to encompass both enhancement and merit, without legal distinction.

<sup>4</sup> *Mid - Florida, supra* at 652.

FCC 2d 72 (Rev. Bd. 1983), *review denied*, FCC 84-161 (April 13, 1984), *appealed sub nom. Steele v. FCC*, No. 84-1176 (D.C. Cir. *motion for remand granted*, Oct. 9, 1986), a comparative application proceeding for a new FM broadcast station, the Commission's Review Board found that, between two competing applicants, neither of whom owned any other media properties and both of whom were to be sole owner-operators of the station, the woman's qualitative enhancement credits for 100% female integration and past local residence prevailed over the nonminority male applicant with an enhancement for prior broadcast experience. The Commission affirmed this decision and the losing applicant appealed, challenging the constitutionality of the female preference policy.

6. A majority of a divided three-judge panel of the Court of Appeals held that the gender preference was invalid because it exceeded the Commission's statutory authority. *Steele v. FCC*, 770 F.2d 1192, 1199 (D.C. Cir. 1985), and it reversed the Commission's decision. The majority stated that the assumptions underlying the preference policies "run counter to the fundamental constitutional principle that race, sex, and national origin are not valid factors upon which to base government policy." *Id.* at 1198. The majority added:

[T]he Commission has been unable to offer any evidence other than statistical underrepresentation to support its bald assertion that more women station owners would increase programming diversity. Instead, a few Commission employees without any evidence, reasoning, or explanation, gratuitously decreed one day that female preferences would henceforth be awarded. . . . Presumably, the Board thought that it was a Good Idea and would lead to a Better World. Contrary to the Commission's apparent supposition, however, a mandate to serve the public interest is not a license to conduct exper-

iments in social engineering conceived seemingly by whim and rationalized by conclusory data.

770 F.2d at 1199.

7. The court, *en banc*, granted a rehearing and vacated the panel opinion in an order released October 31, 1985. In a subsequent order on November 22, 1985, the court asked the parties to file supplemental briefs addressing the Commission's statutory authority to grant gender-based preferences and the constitutionality of such grants. The Commission responded with a brief that expressed its concern that both the female and minority preference policies do not at present satisfy statutory and constitutional requirements, because the Commission had never undertaken a proceeding to determine whether there is a nexus between the preference scheme and enhanced diversity, but instead had assumed such a nexus. At the same time, the Commission sought a remand so that it could conduct such a proceeding. *Steele v. FCC*, No. 84-1176 (D.C. Cir. *motion for remand filed* Sept. 12, 1986). That motion was granted in an order released October 9, 1986.

#### **B. Tax Certificate and Distress Sale Policies**

8. Applying the reasoning of *TV 9* and in response to concerns raised in the Federal Communications Commission's Minority Ownership Task Force, *Minority Ownership Report* (1978), the Commission has adopted two additional minority ownership policies to encourage broadcasters to seek out minority purchasers. *Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 982-983 (1978). First, the Commission used its authority under 28 U.S.C. §1071 to grant tax certificates to assignors or transferors whose voluntary sales of their broadcast stations would increase minority ownership where it determined that "there is substantial likelihood that diversity of programming will be increased." *Id.* The Commission contemplated issuing tax certificates where

minority ownership would be controlling, and it would consider issuing certificates in other cases where "minority ownership [would be] significant enough to justify the certificate in light of the purpose of the policy. . . ." *Id.* at 983 n.20.<sup>5</sup> Section 1071 authorizes the Commission to issue tax certificates whenever a sale of a broadcast property is found to be "necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to ownership and control of radio broadcasting stations." Tax certificates allow the seller to defer capital gains taxation on the proceeds of the sale.

9. Second, the Commission extended its existing distress sale policy, which as originally adopted allowed incapacitated or bankrupt broadcasters to sell their stations, to include distress sales to prospective purchasers with significant minority ownership interests. *Id.* at 983. Under this policy, the Commission permits a licensee whose license or whose renewal application is designated for hearing on basic qualifications issues to transfer or assign its license to a qualified minority applicant at a distress sale price, if the sale occurs before the hearing is initiated and the parties "demonstrate how the sale would further the goals" underlying the policy. *Id.* The goals are described simply as "fostering the growth of minority ownership," *id.* at 982, because of the assumption in *TV 9* that minority ownership and participation in management can be expected to increase diversity of program content as well as diversity of control of the media. *Id.*<sup>6</sup>

<sup>5</sup> See *Policy Regarding the Advancement of Minority Ownership in Broadcasting*, Gen. Docket No. 82-797, 92 FCC 2d 849 (1982), regarding the availability of tax certificates for limited partnerships and "start-up" financing.

<sup>6</sup> In a Notice of Inquiry in MM Docket No. 85-299, the Commission proposed to permit distress sales of broadcast properties to minorities after a revocation or renewal hearing has commenced, provided the

10. The application of this distress sale policy is the subject of a pending appeal in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir. *supplemental brief ordered* Sept. 18, 1986). Recognizing that the minority distress sale policy may implicate some of the same statutory and constitutional concerns as the comparative preference policy in *Steele*, the Commission asked the court to remand *Shurberg* for further Commission consideration after the Commission's Motion for Remand of the *Steele* case was granted. The Motion for Remand, filed October 23, 1986, is pending before the court.

11. The minority tax certificate policy, adopted in the same decision as the distress sale policy, was premised on the same diversity assumption, and therefore must necessarily be addressed in the instant proceeding.

### C. Commission Concerns

12. The Commission adopted its policies fostering minority ownership and applied racial and gender preferences in comparative hearings to respond to the court's mandates in *TV 9* and *Garrett, supra*, that the FCC should assume that minority ownership affects content diversity. Thus, in compliance with the court's holdings, the Commission has applied its comparative policy solely on the basis of the amount of minority or female ownership reflected in management. Likewise, the Commission, in its *Policy on Minority Ownership of Broadcasting Facilities, supra*, based its distress sale and tax certificate decisions on the nature of the minority interests, *i.e.*, whether they were controlling.

transaction is entered into prior to the filing of proposed findings of fact and conclusions of law and the sale price is no more than 50 percent of the fair market value. Distress Sale Policy for Broadcast Licenses, 50 Fed. Reg. 42047 (1985). Because the issues there will be affected by the Commission's decision in this proceeding, we will hold in abeyance our consideration of MM Docket No. 85-299 until this proceeding is concluded.

13. As indicated previously, the Supreme Court decided several cases involving affirmative action programs that may implicate the Commission's comparative preference, minority distress sale and minority tax certificate programs. See, e.g., *Wygant v. Jackson Board of Education*, 90 L. Ed. 2d 260 (1986); *Fullilove v. Klutznik*, 448 U.S. 448 (1980); *Regents of University of California v. Bakke*, 4438 U.S. 265 (1978). See also *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) ("heightened scrutiny" applied to gender-based classifications). Although these cases are primarily concerned with quota or set-aside affirmative action remedies for past discrimination,<sup>7</sup> collectively these cases at a minimum establish the proposition that classifications based on race or sex are inherently suspect, presumptively invalid, and subject to strict or heightened scrutiny. Because there is no factual predicate against which to apply such cases, the Commission has initiated this proceeding to reexamine its policies based on racial or gender classifications and preferences.

14. As stated previously, the purpose behind each of these policies has been to expand program diversity. We find program diversity compelling governmental interest within the Commission's authority. Although we do not interpret the Supreme Court opinions to preclude consideration of race or gender in the licensing process under all circumstances, we do read these cases to mean that the use of minority/gender status must include a determination of whether their use is necessary and narrowly tailored to achieve their goals. The Commission's brief concluded, in response to the *Steele* court's questions, that racial or gender classifications may not be based on the assumption alone that integrated minority/female owners will result in increased content diversity. The Commission concluded, therefore, that an inquiry should be conducted

<sup>7</sup> In *Bakke*, Justice Powell addressed the University's interest in selecting a diverse student body, 438 U.S. at 315.

to reexamine the legal and factual predicates of our policies. To this end, we seek to determine whether there is a nexus between minority/female ownership and viewpoint diversity, and whether such ownership is necessary to achieve this goal. The questions that follow are designed to elicit evidence on these points. They are also designed to focus attention on the effectiveness of these policies in achieving their intended goals and on other alternatives the Commission might or should consider. We also seek to determine whether, as a matter of policy, these preference schemes should be retained.

## SPECIFIC QUESTIONS AND REQUEST FOR COMMENTS

### I. THE CONSTITUTIONALITY OF THE POLICIES

15. The overarching question that must be addressed is, of course, whether the preference, distress sale, and tax certificate policies as presently constituted and administered are constitutional. In addressing this question, commenters should submit analyses of relevant case law in support of their reasoning and specific data to support their factual conclusions. In the course of this analysis, particular consideration of the questions outlined below also will be helpful.

16. The "strict scrutiny" test applied in cases involving race classifications and the heightened scrutiny test applied in gender classifications require that government actions be premised on a clearly established factual record. Furthermore, in assessing the constitutionality of race or gender-conscious remedies, courts have required that the remedy chosen be "narrowly tailored" to achieve the government's legitimate, articulated purpose. In assessing these issues, commenters should focus on the following questions.<sup>8</sup>

<sup>8</sup> Commenters should be as specific as possible in presenting data supporting their responses. We encourage parties to submit original

a. Is a demonstrated relationship between minority/female ownership and minority/female-oriented programming necessarily required as a matter of law to support the constitutionality of the Commission's comparative preference, distress sale, and tax certificate policies? If not, please cite relevant case law in support of this position. Are there any circumstances under which such a relationship can be presumed? On what basis? May the Commission rely upon reasonable expectation or its own expert judgment on these matters, even in part? Is increased minority or female ownership in and of itself a sufficient governmental interest and does it pass constitutional muster?

b. To what extent is the relationship between integrated minority/female ownership and increased availability of minority/female perspectives and programming empirically demonstrable? Is there, for example, a demonstrable difference in the amount or nature of minority-oriented programming broadcast by minority-owned stations and that broadcast by nonminority-owned stations under similar market conditions, such as where there is a significant minority population? How should minority or female-oriented programming be defined for purposes of this analysis? Do these definitions apply to all media?

c. Is the evidence relating to the nexus between ownership and programming any different when

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empirical studies to support their positions. Where such analyses are submitted, the methodologies employed should be described in detail. Studies submitted should attempt to control for other factors which may also affect viewpoint diversity, such as market size or demographic characteristics. We recognize, of course, that not all of these questions raise issues that are susceptible to empirical study, but for those that are, we would ask commenters to submit the best data available.

minority and female ownership are combined with significant management roles, as is required under the comparative preference policy, as contrasted with ownership that is not integrated into management, as is permitted under the tax certificate and distress sale policies?

d. The Supreme Court precedent suggests that a higher level of scrutiny may apply to race-based classifications than to gender-based classifications. If that is true, what is the effect of this difference on the constitutionality of our policies?

17. Equal protection concerns generally require that there be no reasonable way to achieve the state's goals by means of imposing a lesser limitation on the rights of the group disadvantaged by the classification.

a. Are there effective means of achieving increased program diversity that do not require the use of race/gender classifications? For example, to what extent do market forces independently produce a mix of programming serving the varied needs and interests of broadcast audiences?

b. Should the Commission continue to grant preferences to minorities and women in comparative licensing proceedings, but permit nonminorities and men to overcome such preferences by making a showing that they will make an equal or superior contribution to diversity? Would this affect the constitutionality of the policy? How could such showings be made? Should the tax certificate and distress sale policies be similarly altered?

c. Should the Commission, for example, return to its original position in the *TV 9* case, under which all applicants seeking a diversity preference make individual showings to demonstrate a specific contribution to program diversity? Should

this showing be open to any individual or limited to minorities and women? Should an analogous approach for distress sales and tax certificates be adopted? Is there a way for the Commission to evaluate such individual showings without having to directly analyze program content, for example, by linking any preference to demonstration of past involvement with minority/female issues which may be a more reliable indicator than race or gender *per se*?

d. If race and gender classifications are used in the Commission's ownership policies, how long should they be employed? What monitoring mechanisms should be used? What are the First Amendment ramifications of any such monitoring? If a demonstrable nexus is found, is the comparative process constitutional as presently administered? Distress sales? Tax certificates?

e. Please comment upon the Commission's present practice of granting integrated female owners an enhancement of lesser weight than that granted integrated minority owners in the comparative process. Is there an adequate constitutional basis for these gradations of enhancement? Is there a factual basis for these gradations of enhancement relevant to the Commission's public interest mandate?

#### **Significance of Legislative History of Lottery Statute**

18. In enacting the lottery licensing provisions of Section 309(i) of the Communications Act in 1982, Congress explicitly incorporated a mandatory minority preference scheme. In connection with that enactment and in other proceedings, Congress has made various statements that relate ownership diversity to diversity of programming and that find a substantial underrepresentation of minorities

and women among owners of mass media. Parties are invited to comment on the referenced Congressional record as a basis, in constitutional terms, for Commission action in continuing to apply the subject ownership policies. We solicit comment on whether the Commission is bound by, or may rely upon, Congressional findings of constitutionality, until directed otherwise by a court, or whether the Commission must independently assess the constitutional issues.

#### **II. EFFECTIVENESS OF CURRENT POLICIES AND ALTERNATIVES**

19. In re-evaluating the existing policies, it is necessary to ascertain the extent to which they have been effective. For this purpose, interested parties are asked to address the following questions.

a. To what extent have the subject policies resulted in minority and female ownership? Is there anything in the comparative process that acts as a barrier to the entry of minorities and women into broadcasting? In practice, have integration proposals been carried out? How long have owners benefiting from the policies continued their ownership roles? Has the number of minority and female-owned stations increased, and by how much, since the adoption of each policy? What percentage of stations have been acquired by utilizing these policies?

b. What are the major impediments to increasing minority ownership of the broadcast media? Does financing continue to be a substantial problem? To what extent is lack of information on ownership opportunities a problem? What part might the Commission play in eliminating these and other extrinsic problems?

c. What social or other costs might result from continuing these policies? Are these costs out-

weighed by the benefits to be derived from continuing these policies?

20. Commenters are invited to respond to the above questions and to address any other matters raised herein or that the parties deem relevant to a careful reexamination of the subject policies. We encourage parties to submit empirical evidence and hard data wherever possible to support their positions. Where such evidence or data is filed, parties should describe fully the methodology utilized in its compilation and analysis. Parties submitting comments on the constitutional issues presented in the Commission's brief in *Steele* or in this *Notice* are requested to include citations to relevant statutes and case law. Finally, we request that parties identify the question to which they are responding in their comments.

#### PROCEDURAL MATTERS

21. Authority for this *Notice of Inquiry* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended. Pursuant to applicable provisions set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before May 7, 1987, and reply comments on or before July 6, 1987. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

22. It is our intention at the conclusion of this inquiry proceeding to adopt a final policy statement. Therefore, for purposes of this nonrestricted notice of inquiry proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of inquiry until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order dis-

posing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's Rules, 47 C.F.R. Section 1.1231. Parties are advised, however, that the specific proceedings involved in the *Steele* and *Shurberg* cases are restricted adjudicatory proceedings and remain subject to the strict *ex parte* provisions of Section 1.1203, *et seq.* of our rules, 47 C.F.R. Section 1.1203, *et seq.*

23. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 5 copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished to the Commission. Members of the general public who wish to participate informally in the proceeding may submit one copy of their comments, specifying the docket number in the heading. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 "M" Street, N.W., Washington, D.C. 20554.

24. In view of the fact that we have asked the court to remand the *Steele* case, because of doubts as to the constitutionality of the minority and female enhancement credits, and more particularly, in view of the fact that we are holding that case in abeyance pending completion of this proceeding, we believe it might be arbitrary and capricious to continue to award licenses in other comparative licensing proceedings where the effect of such credits is dispositive. We, therefore, are directing administrative law judges to make findings as to all issues in dispute, including entitlement to a racial/gender preference, and to hold in abeyance all decisions where such credits are dispositive. We see no need, however, to delay action on cases the outcome of which would not be affected by awards of such preferences. Thus, an administrative law judge hearing a comparative licensing case in which a minority/female credit is claimed should make findings and reach conclusions based on application of these credits and, in the alternative, should determine which applicant would prevail if the credits were disallowed. If the credit would not be dispositive, the case should be decided. If, on the other hand, award of the credit would be dispositive, the case should be held in abeyance pending final resolution of this proceeding. The Review Board and Office of General Counsel are also directed to hold in abeyance any cases within their purview where such credits are dispositive.

25. Similarly, because the Commission has requested that the Court of Appeals remand *Shurberg* for reconsideration, and is now holding that application in abeyance pending completion of this docket, the Mass Media Bureau will hold in abeyance all other pending or future applications for distress sales pursuant to the minority ownership policy until such time as a decision in the *Shurberg* proceeding has become final. In the event the Court decides not to grant a remand, applications should be held until the court disposes of the case on the merits; in the event a remand is

granted, applications should be held pending the final resolution of this proceeding.

26. Although the Commission's tax certificate policy raises some of the same questions as the award of race or gender-based credits in comparative licensing proceedings and the grant of distress sale relief, the Commission has not been presented with a specific case challenging that policy and has had no occasion to consider the validity of that policy. Unlike the comparative preference and distress sale cases, no specific tax certificate application is being held in abeyance. Therefore, we are not constrained by the same equitable considerations present in comparative licensing and distress sale cases to hold pending and future tax certificate requests in abeyance. Accordingly, in the event an application for a tax certificate is filed,<sup>9</sup> the Bureau, unless otherwise directed by the Commission, should process the request and grant the tax certificate, if warranted.

27. Accordingly, IT IS ORDERED, That in all comparative licensing cases where a racial, ethnic or gender preference would be awarded in the absence of concerns as to the constitutionality of those preferences, the presiding administrative law judge (after having made findings as to all disputed issues of fact), the Review Board, or the Office of the General Counsel, as the case may be, SHALL DETERMINE whether award of the preference would be dispositive of the outcome of the proceeding and, if so, SHALL DEFER action on such cases pending final resolution of this proceeding.

28. IT IS FURTHER ORDERED, That the Mass Media Bureau SHALL HOLD IN ABEYANCE all applications for preferential treatment under the Commission's distress sale policy pending the earlier of (a) a final judicial determination

<sup>9</sup> At the moment, there are no pending requests for issuance of tax certificates premised on the sale of licensed facilities to a minority or minority-controlled group.

upholding the validity of the distress sale policy or (b) the final resolution of this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico  
Secretary

SEPARATE STATEMENT BY COMMISSIONER JAMES H.  
QUELLO

Re: Inquiry into the Commission's Comparative Licensing,  
Distress Sales and Tax Certificate Policies

Today the Commission launches an inquiry into its comparative licensing, distress sales and tax certificate policies. The primary focus of this inquiry is on the legality of those policies. However, the Commission has also decided that this is an appropriate occasion to assess the success of those policies during the eight years since their adoption. I support these efforts because I believe that both are necessary and proper concerns to the Commission's fulfillment of its public interest obligations.

As I have emphasized before, I remain committed to the Commission's longstanding goal of encouraging and assisting minority and female entry into broadcasting. I have also stated, on other occasions, that I am not inclined to question the wisdom of continuing our minority policies if they are constitutional. To the extent that this Notice of Inquiry contains conclusory statements relating to the legality of our policies, I am not necessarily in accord with those statements and will reserve judgment until I have a record before me. I cannot quarrel, however, with my colleagues' desire to seek comment on whether these policies are indeed accomplishing the worthy objectives that they were designed to achieve. I do, however, place a heavy burden on those that challenge either the constitutionality or the wisdom of our longstanding Commission policy of minority preferences. I intend to study this record very closely before reaching any conclusions on these sensitive issues.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 84-1600

Shurberg Broadcasting of Hartford, Inc.

*Appellant,*

v.

Astroline Communications Company  
Limited Partnership

*Intervenor*

United States Court of Appeals  
For The District of Columbia Circuit

FILED JAN 23 1987

GEORGE A. FISHER  
CLERK

BEFORE: WALD, Chief Judge, SILBERMAN, Circuit Judge,  
and MACKINNON, Sr. Circuit Judge.

ORDER

Upon consideration of the Appellee's motion for remand, and the oppositions of Appellant, Intervenor, and Amici Curiae, it is hereby

ORDERED that the record is remanded for ninety (90) days, without extension, to permit the FCC to resolve its position with respect to the license at issue in this case.

For the Court

/s/ George A. Fisher  
George A. Fisher, Clerk

"Brief of Shurberg Broadcasting of Hartford, Inc." filed with the FCC by SBH, February 27, 1987, pursuant to the Court's remand order, and refiled by SBH with the Court of Appeals, April 2, 1987, Attachment A

# ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP

## Schedule A

General Partners	Initial Capital Contribution	Additional Capital Contribution	Future Capital Contribution	Percentage Interest
Richard P. Ramirez c/o Astroline Communications Company Limited Partnership 18 Garden Street Hartford, CT 06105	\$ 210	\$ 0	\$ 0	21%
WHCT Management, Inc. 231 John Street Reading, MA 01867	\$ 60	\$ 0	\$ 0	6%
Thomas A. Hart, Jr. 1862 Ingleside Terrace, N.W. Washington, D.C. 20010	\$ 10	\$ 0	\$ 0	1%

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## Limited Partners

Astroline Company 231 John Street Reading, MA 01867	\$440,616	\$7,705,714	\$165,714	58%
Martha Rose and Robert Rose as Joint Tenants 18 Morgan Street Wanham, MA 01984	\$ 30,042	\$ 797,143	\$ 17,142	6%
Thelma N. Gibbs 227S South Ocean Blvd. Palm Beach, FL 33480	\$ 30,042	\$ 797,143	\$ 17,142	6%
Terry Planell c/o Astroline Communications Company Limited Partnership 18 Garden Street Hartford, CT 06105	\$ 10	\$ 0	\$ 0	1%
Danielle Webb c/o Astroline Communications Company Limited Partnership 18 Garden Street Hartford, CT 06105	\$ 10	\$ 0	\$ 0	1%

JA-69

Oral Argument Was Held In This Case On January 8, 1986

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—  
No. 84-1600  
—

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION  
*Appellee*

ASTROLINE COMMUNICATIONS CO.  
*Intervenor*

REPORT AND MOTION FOR FURTHER REMAND  
OR, IN THE ALTERNATIVE, TO HOLD IN ABEYANCE

In an order of January 23, 1987, the Court remanded the record in the captioned case "for ninety (90) days, without extension, to permit the FCC to resolve its position with respect to the license at issue in this case." This pleading constitutes the Commission's response to the Court's order.

Appellant in this case seeks review of a Commission order authorizing a "distress" sale of a television station to a minority controlled buyer. Only certain persons or companies, namely members of certain minority groups and minority-controlled companies, are eligible to buy a station pursuant to the distress sale policy. In a motion filed in this case on October 23, 1986, the Commission sought remand of the record for further consideration in connection with the Court's then recent remand in another case—*Steele v. FCC*, No. 84-1176. The Commission pointed out that the distress sale policy raised many of the same

questions that were presented by the *Steele* case. The Commission stated that because it intended "to undertake a proceeding to ascertain whether there is an adequate justification for the policy of granting comparative preferences based on race and gender, it seems appropriate also to reexamine the justification for the distress sale policy." (Motion at 2).

The above-quoted language reflected the Commission's judgment at the time that it could not arrive at a proper disposition of this case until it had the benefit of its deliberations in the general proceeding to be undertaken in the aftermath of the *Steele* remand. The motion, however, did not specify how long the Commission believed it would take to complete that general proceeding. Upon receipt of the Court's order containing a ninety-day deadline, the Commission, as explained below, revisited its judgment that this case was inextricably linked with the general proceeding. Because the Commission has again concluded that this linkage exists, it is appropriate now to describe the progress of the general proceeding, including an explanation of why it is not possible to complete that proceeding by the time when, according to the Court's January 23d order, the remand in this case is to terminate.

On December 30, 1986 the Commission released a notice of inquiry beginning its general proceeding. *See Notice of Inquiry*, 1 FCC Rcd 1315 (1986). The proceeding is intended to examine the statutory and constitutional validity, and the factual basis for, the Commission's race and gender preference policies used in comparative licensing proceedings, as well as in distress sales and tax certificates. The Commission announced in that notice its intention, pending the adoption of a policy statement at the conclusion of the proceeding, to hold in abeyance all pending comparative licensing proceedings where a race or gender preference could be dispositive and all distress sale applications. *Id.* at 1318-19. Because of the importance of the questions raised in the comprehensive inquiry and because

resolution of these questions, in part, involves significant gathering and analysis of facts, the Commission provided a longer than normal time for the filing of comments. Initial comments are due to be filed on May 6, 1987 and reply comments are due by July 6, 1987. A copy of that Notice was submitted to the Court in this case. See Letter of Jan. 2, 1987 from C. Grey Pash, Jr. to George A. Fisher.

Following the Court's January 23, 1987 remand order in this case, the Commission's General Counsel sought from the parties to this case comments on the appropriate response to the Court's order. Specifically, the General Counsel stated that "it would be useful to the Commission to have the parties' views as to how they believe that the Commission can resolve its position 'with respect to the license at issue in this case' without first resolving the general question of the constitutionality of the distress sale policy that is presently under consideration in the inquiry proceeding discussed in note 1 above." *Faith Center, Inc.*, FCC 87I-015 (GC Feb. 11, 1987) at para. 2.

Comments were submitted by Shurberg, Astroline and the Commission's Mass Media Bureau.<sup>1</sup> After carefully reviewing these comments in light of the Commission's original order in this case and its notice of inquiry instituting the proceeding to investigate racial and gender preference policies, the Commission has concluded that it is unable to resolve its position with respect to the license at issue in this case until it has concluded its general inquiry into the validity of race and gender preferences.<sup>2</sup>

<sup>1</sup> An appendix containing copies of the parties' submissions is attached to this report.

<sup>2</sup> The submissions of the parties, although helpful to the Commission, did not provide a basis for the Commission to answer the question that it had posed in the request for comments, i.e., how it could resolve its position with respect to this licensing proceeding prior to resolving the general question of the constitutionality of the distress sale policy. The

An examination of the Commission's order in this proceedings makes clear that the Commission's decision to permit Faith Center to sell its station to Astroline pursuant to the distress sale policy was the major reason for the Commission's refusal to accept Shurberg's competing application. The Commission explained that it was "faced with determining whether the public interest in permitting competing applications to be filed, as articulated in *New South*, outweighs the goals of our minority ownership policies in this case." *Faith Center, Inc.*, 99 F.C.C.2d 1164, 1170 (1984). The Commission concluded that the minority ownership policies should prevail.

The Commission believes that that determination should simply be held in abeyance at this time—neither withdrawn nor reaffirmed by the Commission nor reversed nor affirmed by the Court. Action by the Commission or the Court before the general proceeding on preferences is con-

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Commission's Mass Media Bureau took the position that because Shurberg never had a right to file a competing application under existing FCC policy, it was not harmed by the Commission's failure to accept its application and grant of the distress sale application. The Bureau and Astroline both suggested that weight should be given to Astroline's reliance on the existence of the distress sale policy when it filed its application and its expectation that there would be no change in that policy that would vitiate a grant to it, i.e., that would in effect operate retroactively. Shurberg argued that the Commission could avoid the constitutional issue only by confessing error in its conclusion that Shurberg had not been entitled to file a competing application and seeking a remand to undertake the comparative proceeding that Shurberg contends is required. Because of the nature of its order granting the distress sale application here, separating the related policy determinations in which the Commission had balanced the competing public policies at that time in favor of comparative licensing proceedings on the one hand and distress sales to encourage minority ownership on the other is not feasible. In addition, it would be premature to address the reliance/retroactivity questions until the Commission has resolved the general issue of the validity of the distress sale policy since the nature of that decision could be relevant to whether a new policy, if the policy is changed, should be applicable to a situation such as this one.

cluded would, we submit, be premature. Even if the Commission were to eliminate preferences such as the distress sale policy, it has not yet addressed the question of how it would apply such a policy change to situations such as the instant one. Moreover, we would respectfully submit that the Court should not rush to conclude judicial review of an agency decision that is based on a policy about which the agency has subsequently expressed serious reservations and which it is presently re-examining.<sup>3</sup>

We recognize that this case has been pending for some time. However, the harm incurred by the relatively limited further delay awaiting Commission resolution of the general preferences inquiry is not significant and would appear to be evenly divided between the parties. Astroline would have to endure a few more months of uncertainty as to the validity of its grant while Shurberg's efforts to become a participant in a comparative hearing for a construction permit to operate this station would be delayed a bit longer. Neither harm appears so severe as to warrant action at this time.

### CONCLUSION

In consideration of the foregoing, we respectfully move the Court for a further remand of the record in this case

<sup>3</sup> The brief filed by the Commission in this case defended the constitutionality of the distress sales policy. That portion of the brief does not reflect the agency's present view. The Commission's present position on the constitutionality of racial and gender preferences relative to broadcast licensing is reflected in the brief on rehearing *en banc* filed in the *Steele* case and in the *Notice of Inquiry* in the preferences proceeding discussed above, in which the Commission expressed its concern that its comparative preference policies do not at present satisfy constitutional requirements. The Commission has not definitively concluded to what extent the *Steele* brief applies to distress sales, but it has concluded that enough of the same issues are raised that the distress sale policy should be re-examined in the general inquiry proceeding and no distress sales will be granted by the Commission pending completion of that inquiry.

pending final Commission action in its general inquiry into the validity of race and gender preferences. In the alternative, we request that if the Court concludes that it must reach the constitutional issue to decide this case that it hold the case in abeyance itself pending the Commission's conclusion of the general inquiry.

Respectfully submitted,

Diane S. Killory,  
General Counsel

Daniel M. Armstrong,  
Associate General Counsel

C. Grey Pash, Jr.,  
Counsel

Federal Communications Commission  
Washington, D. C. 20554  
(202) 632-6444

March 23, 1987

Oral Argument Was Held In This Case On January 8, 1986

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—  
No. 84-1600  
—

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee*

ASTROLINE COMMUNICATIONS CO.,  
*Intervenor*

REPORT IN RESPONSE TO REMAND ORDER

In an order of January 23, 1987, the Court remanded the record in the captioned case "for ninety (90) days, without extension, to permit the FCC to resolve its position with respect to the license at issue in this case." On March 23, 1987, the Commission submitted a "Report and Motion for Further Remand or, in the Alternative, To Hold in Abeyance." By order of April 7, 1987, the Court denied the request for further remand or to hold in abeyance and stated that "[t]he Court's ORDER of January 23, 1987 remains in effect." This report is in response to the January 23rd remand order.

The Commission's preferred course was to have the Court remand this case in a manner that would permit the Commission to withhold action pending completion of its ongoing proceeding exploring the lawfulness of the distress sale and other minority and gender preference policies, or for the Court to hold the case in abeyance itself pending the completion of that proceeding. However, be-

cause the Court's April 7th order essentially directed the Commission to proceed with this case, the Commission submits this response, which represents as definitive a position as is possible pending the completion of the comprehensive proceeding now underway at the Commission.

The Commission's present position on minority and gender preferences relative to broadcast licensing is reflected in the brief on rehearing *en banc* filed in *Steele v. FCC* and in the *Notice of Inquiry*, 1 FCC Rcd 1315 (1986), instituting the proceeding to explore generally the Commission's minority and gender preference policies. The Commission, in those documents, expressed its concern that the minority and gender preference policies that it had employed in comparative licensing proceedings do not at present satisfy constitutional requirements. In the *Notice of Inquiry* the Commission concluded that enough of the same issues were raised with respect to the distress sale policy that it also should be re-examined in the general inquiry proceeding and that no distress sales would be granted by the Commission pending completion of that inquiry.

In reviewing the distress sale petition in this case, the Commission examined only the question whether the proposal made by Faith Center and Astroline met "the basic requirements for a distress sale . . ." *Faith Center, Inc.*, 99 F.C.C.2d 1164, 1172 (1984). The "basic requirements" included only an examination whether the existing licensee was eligible to transfer the station pursuant to a distress sale, whether the distress sale buyer had the requisite minority ownership and whether the sale price agreed to by the parties met the Commission's requirements. As has been its consistent practice to this point in its implementation of the distress sale policy, the Commission *assumed* that minority ownership would further the public interest. Based on this practice, the Commission automatically has granted distress sale petitions where the buyer was a minority and the other basic requirements were met. Non-

minorities could not take advantage of the distress sale policy to purchase a station, regardless of what showing they might be able to make regarding the public interest benefits of their proposed operation of the station.

Thus, as applied, the distress sale policy has been based on the same sorts of assumptions and presumptions about minority ownership that the Commission has concluded in the *Steele* case lack factual support. To the extent that the distress sale policy also relies on assumptions that minority ownership will result in increased program diversity, the Commission has similar concerns as to the constitutionality of the distress sale policy.<sup>1</sup> The Commission explained in the *Notice of Inquiry* that, although encouraging program diversity is a "compelling governmental interest within the Commission's authority, . . . racial or gender classifications may not be based on the assumption alone that integrated minority/female owners will result in increased content diversity." 1 FCC Rcd at 1317. Thus, the Commission sought in that inquiry "to determine whether there is a nexus between minority/female ownership and viewpoint diversity, and whether such ownership is necessary to achieve that goal." *Ibid.*

While in its application the distress sale policy is constitutionally suspect, it may be possible for the distress sale policy to be implemented in a constitutional manner. When the Commission adopted the distress sale policy for minority owners in 1978, it said that "[t]he parties involved

<sup>1</sup> Indeed it could be argued that the distress sale policy presents more difficult questions than comparative preferences. Unlike comparative proceedings where the minority preference is only one of a number of potential comparative considerations, the minority distress sale policy is available *only* to minorities or minority-controlled applicants. Moreover, the comparative preference is available only where the minority owner will be integrated into the proposed station's daily operations. No such requirement exists in the case of distress sales, and the minority owner thus may have no regular involvement in programming decisions or effect on programming diversity.

in each proposed transaction will be expected to demonstrate to us how the sale would further the goals on which we are today basing the extension of our distress sale policy." *Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 983 (1978). The Commission declined to adopt a formal regulation permitting such transfers, stating that "cases should be reviewed as they arise to determine that the objectives of our policies will be met." *Ibid.* Despite that ruling in 1978, the Commission's subsequent practice has been to assume the policy objectives will be met whenever a minority is the transferee. Whether the Commission should undertake a particularized examination of each distress sale petition and whether such a policy would be both lawful and wise, are questions to be explored in the ongoing general preferences proceeding. In this case, as noted above, the Commission did not engage in that sort of particularized examination of the distress sale petition.

In light of the Court's rejection of the Commission's preferred course of holding this case in abeyance pending resolution of the general inquiry, the agency has given further consideration to the validity and implementation of the distress sale policy in this particular case. Because of the constitutional concerns presented by minority-based government action that relies on unproven assumptions, the Commission has determined that it cannot definitively resolve whether the distress sale policy, as historically applied, is valid as a matter of law or policy, until the ongoing inquiry has been completed.

The instant case, however, does involve unusual circumstances—notably, the lengthy delay which has occurred since 1980 in removing the uncertainty surrounding the license for this station and the Court's decision that this case should proceed without awaiting the completion of the Commission's comprehensive inquiry into minority and gender preferences. The Commission, accordingly, has now determined in the exercise of its discretion that it would

be appropriate to conclude at this time that if the Commission should modify its distress sale policy at the conclusion of its ongoing general inquiry, it would not apply any such new or modified policy to this case. The grant of the distress sale petition here became final, from the Commission's perspective, long before the Commission publicly questioned and sought to reexamine the validity of the distress sale policy, thus leading to justifiable reliance by Astroline on the continuing applicability of the policy.<sup>2</sup>

In consideration of the foregoing, the Commission respectfully urges the Court promptly to affirm the agency's action granting the distress sale application in this case.

Respectfully submitted,

Diane S. Killory,  
General Counsel

Daniel M. Armstrong,  
Associate General Counsel

C. Grey Pash, Jr.,  
Counsel

Federal Communications Commission  
Washington, D. C. 20554  
(202) 632-6444

April 23, 1987

<sup>2</sup> Shurberg has previously noted, and we do not disagree, that Astroline undertook the risk of proceeding with construction and operation of the station pursuant to the Commission's grant while judicial review was still pending in this Court. The Commission believes, however, that in assessing the risk of proceeding pending judicial review, Astroline was entitled to assume that the Commission would support before the Court affirmance of the order granting Astroline's petition.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

\_\_\_\_\_  
No. 84-1600  
\_\_\_\_\_

Shurberg Broadcasting of Hartford, Inc.,  
v.

Federal Communications Commission

Astroline Communications Company Limited Partnership,  
*Intervenor.*

United States Court of Appeals  
For the District of Columbia Circuit

FILED JUN 25 1987

GEORGE A. FISHER  
CLERK

BEFORE: WALD, Chief Judge; SILBERMAN, Circuit  
Judge, and MacKINNON, Senior Circuit Judge

ORDER

Upon all the records, pleadings, and proceedings herein,  
it is hereby

ORDERED, by the Court, that the record in this case  
is remanded for further proceedings.

On remand, the FCC shall take whatever action is appropriate in this case in conformance with its resolution of the issues described in its Notice of Inquiry, MM Docket No. 86-484, 52 Fed. Reg. 596 (1987), provided however, that if the FCC has not made a final determination in the above cited proceeding before the date on which the license at issue in this case would ordinarily be due for renewal,

the FCC shall call for and consider competing applications at the appropriate time, and promptly process such applications according to established FCC procedures. See especially 52 Fed. Reg. at 600. If the FCC should initiate a comparative renewal proceeding concerning this license prior to resolution of the matters on MM Docket No. 86-484, in light of the representations made to this Court at the time appellant sought a stay of the FCC's order, the FCC shall conduct such proceedings without according intervenor Astroline Communications Company Limited Partnership any competitive advantage that would ordinarily accompany incumbency.

*Per Curiam*  
For the Court:  
/s/ George A. Fisher  
George A. Fisher,  
Clerk

Dissenting Statement of Circuit Judge Silberman attached.

*Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600

SILBERMAN, *Dissenting Statement*: I respectfully dissent from the court's order because the FCC's current position, in my view, is indefensible. Last September, the FCC announced in a brief before an en banc panel in *Steele v. FCC*, No. 84-1176, that the Commission had grave doubts about the constitutionality of its policy of granting preferences in comparative hearings to minority and female applicants. In light of the position taken in the *Steele* brief, we asked the Commission whether it continued to stand behind the minority preference embodied in the distress sale policy at issue in this case. In response, the Commission requested that the case be remanded in light of its general reconsideration of racial and gender performances. On January 23, 1987, we remanded the case for 90 days to permit the Commission to determine its position with respect to the license at issue in this case. The Commission has now reported to us that although the distress sale policy is even more constitutionally suspect in its view than comparative preferences, it does not wish to take a firm position as to its legality even as of the date of transfer to Astroline (as compared to any future policy). This kind of courageous fealty to the Constitution seems characteristic of the FCC. See *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987). In order to avoid taking a position, the Commission asserts that whatever the constitutionality of the policy at the time of the transfer to Astroline, the Commission will permit Astroline to keep the license because Astroline has a legitimate reliance interest. But as the court's order notes, the Commission, in its opposition to appellant's motion for a stay, has already committed itself not to accord any weight to Astroline's investments in the station. The majority thus recognizes that the application of the distress sale policy in this case simply cannot be based on a reliance rationale but disregards the fact that the FCC offers no other justification

the FCC shall call for and consider competing applications at the appropriate time, and promptly process such applications according to established FCC procedures. See especially 52 Fed. Reg. at 600. If the FCC should initiate a comparative renewal proceeding concerning this license prior to resolution of the matters on MM Docket No. 86-484, in light of the representations made to this Court at the time appellant sought a stay of the FCC's order, the FCC shall conduct such proceedings without according intervenor Astroline Communications Company Limited Partnership any competitive advantage that would ordinarily accompany incumbency.

*Per Curiam*  
For the Court:  
/s/ George A. Fisher  
George A. Fisher,  
Clerk

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Harry Cole, name partner of D.C.'s Bechtel & Cole, representing Shurberg, says he continuing to challenge Astroline.

But Thomas Hart Jr., a partner in the D.C. office of Baker & Hostetler, says the congressional action bolsters the company's case.

Astroline's lobbying team included Hart, who worked in White House Office of Telecommunications under President Jimmy Carter; Richard Hauser, head of the firm's legislative practice and former deputy counsel to President Reagan; and Pamela Garvey, of counsel and former GOP staffer on the Senate Commerce Committee.

While Garvey was not allowed to lobby the Commerce Committee for one year because of Senate ethics rules, she says she helped draft legislation and advise the team about the personalities and procedures of the Senate. Commerce Committee Chairman Ernest Hollings (D-S.C.) was a major supporter of the legislation, according to lobbyists and Senate staffers. The legislation originated in a committee proposal.

On Hauser's recommendation, Astroline also hired Powell Moore, a lobbyist with the government-affairs firm Ginn, Edington, Moore & Wade and a former assistant secretary of state and White House deputy assistant for legislative affairs. Moore worked the Senate Republicans.

Working the Democrats was Joan Dawson, a solo lobbyist who once worked for Sen. Sam Nunn (D-Ga). She helped with drafting and lining up supporters.

Bruce Fein, an outspoken conservative and former FCC general counsel, was of counsel for Astroline in court.

Hart says support also came from the National Association of Broadcasters and the National Association of Black Owned Broadcasters.

In addition, Daniel Popeo, chairman of the Washington Legal Foundation, a pro-business public-interest law group,

came out on Astroline's side against what he saw as arbitrary government action. According to the Washington Legal Foundation's Michael McDonald, the foundation doesn't lobby, but he says, "Our interests intersected in that one case."

"It caught the imagination of the conservatives and liberals," Dawson says.

Key Senate supporters also included Lowell Weicker Jr. (R-Conn.) and Frank Lautenberg (D-N.J.) Weicker was concerned about the quality of broadcasting in Connecticut and pushed to get the measure included. A Lautenberg aide said Weicker sought the New Jersey senator's help because he was a Democrat on the Senate Appropriations subcommittee that oversees FCC funding. "It was civil rights and a good-policy issue," the Lautenberg aide says. Hollings was subcommittee chairman.

A GOP Commerce Committee staffer says that inclusion of the FCC rules in the budget bill was different from the controversial legislation slipped by Sens. Hollings and Edward Kennedy (D-Mass.) that bars the FCC from continuing cross-ownership waivers for Murdoch. The minority-preference rules surfaced first in separate legislation in September, giving any opponents the chance to fight, the staffer says. (See "*Limiting Speech in the Name of Freedom*," Page 19.)

Cole, a former FCC staffer, says he told senators last fall to say it was inappropriate for Congress to get involved in the middle of FCC and court proceedings, but he didn't "buttonhole" them.

"We're a small law firm. We're not Baker & Hostetler," Cole says of his four-lawyer firm.

ORAL ARGUMENT HELD JANUARY 8, 1986

In The  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—  
No. 84-1600  
—

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee*

ASTROLINE COMMUNICATIONS CO.,  
*Intervenor*

FCC RESPONSE TO MOTION FOR  
EXPEDITED RESOLUTION ON THE MERITS

Appellee Federal Communications Commission hereby submits its response to the "Motion for Expedited Resolution on the Merits" filed by appellant Shurberg Broadcasting.

The Commission earlier represented to the Court that it did not believe that it was appropriate for the Court to proceed with this case while the Commission was reexamining in a general inquiry proceeding the bases for, and validity of, the Commission's minority and female preference policies. That inquiry included an examination of the distress sale policy that underlies this case. The Court remanded the record to the Commission to permit it to take whatever action is appropriate in conformance with the Commission's resolution of issues in the reexamination proceeding. Order of June 25, 1987.

As Shurberg correctly notes in its pleading, the Commission did recently terminate its inquiry prior to its completion. *See Racial, Ethnic & Gender Classifications, MM Docket No. 86-484, FCC 88-17 (Jan. 14, 1988)*. That action was taken in compliance with the Continuing Resolution for Fiscal Year 1988, H.J. Res. 395, Pub. L. No. 100-202, 101 Stat. 1329 (1987), which provides, in relevant part:

That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended, 52 R.R.2d 1313 (1982) and Mid-Florida Television Corp., 60 F.C.C.2d 607 Rev. Bd. (1978), which were effective prior to September 12, 1986, *other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications or proceedings, which were suspended pending the conclusion of the inquiry . . . .*

(emphasis added)

Because the Commission's reexamination proceeding now has been terminated, the basis for our previous position that the Court should not proceed with this case pending resolution of that proceeding no longer is valid. Thus, the Commission agrees with Shurberg's motion to the extent that it argues that further delay in judicial resolution of this case would not be warranted.

We wish, however, to clarify two points on which we take exception to Shurberg's characterization of the facts.

First, Shurberg is inaccurate in asserting that the Commission "appears to have conceded" that the distress sale policy is unconstitutional. Motion at 4. The Commission has made no such concession. The Commission stated in pleadings in this case that it had serious questions about the validity of its comparative licensing preference policy on a variety of grounds, including constitutional grounds, and that many of the same questions were relevant to the distress sale policy. The Commission also stated that it could not finally resolve those questions until it had completed the inquiry into these policies that has now been terminated. However, the Commission has never announced any conclusion that the distress sale policy is unconstitutional.

Second, we reject Shurberg's contention that the parties and the Court are in precisely the position they were in when the FCC first requested a remand in this case. Motion-at 2 & n.1. On the contrary, although the Commission has terminated the reexamination proceeding, it also has adopted and released an order reaffirming its previous action with respect to the license that is at issue in this case. *In re Applications of Faith Center, Inc.*, FCC 88-47 (released February 23, 1988) (Attachment A to this response). That order, like the order terminating the reexamination proceeding, was adopted in order to comply with the legislation. The enactment of the Continuing Resolution, the termination of the Commission's reexamination proceeding, and the Commission's adoption of the order reaffirming its earlier action in this case all are matters that have occurred since the remand. It is thus not accurate to state that the parties and the Court are in "precisely the same place" they were in before the Commission first requested remand.

<sup>1</sup> The Commission simultaneously released similar orders reaffirming its earlier decisions in two other cases involving issues of racial or gender preference. Copies of those decisions are Attachments B and C to this response.

Respectfully submitted,

Diane S. Killory,  
General Counsel

Daniel M. Armstrong,  
Associate General Counsel

C. Grey Pash, Jr.,  
Counsel

Federal Communications Commission  
Washington, D. C. 20554  
(202) 632-6444

February 24, 1988

Before the  
Federal Communications Commission  
Washington, D.C. 20554

BC DOCKET NO. 80-730  
File No. BRCT-348

In re Applications of  
FAITH CENTER, INC.  
Hartford, Connecticut  
For Renewal of License

ORDER

Adopted: February 9, 1988;  
Released: February 23, 1988

By the Commission:

1. This proceeding involves the application of Faith Center, Inc. for renewal of its license for the television station operating on UHF channel 18 at Hartford, Connecticut. By Memorandum Opinion and Order, 99 FCC 2d 1164 (1984), the Commission granted the request of Faith Center to assign the license for this television station to Astroline Communications Company Limited Partnership, pursuant to the Commission's distress sale policy announced in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978), revised, 92 FCC 2d 849 (1982). The Commission also denied the request of Shurberg Broadcasting of Hartford, Inc. to designate its application for a comparative renewal hearing together with Faith Center's renewal application to determine which applicant should operate a television station on Channel 18.

2. Shurberg filed an appeal of the Commission's decision with the United States Court of Appeals for the District of Columbia Circuit. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir. Dec. 10, 1984). One issue raised on appeal by Shurberg was whether the Commission's distress sale policy is constitutional.

3. Thereafter, in a separate matter in 1985, a divided three-judge panel of the Court of Appeals held that the Commission's policy awarding a gender preference in comparative licensing proceedings was invalid because it exceeded the Commission's statutory authority. *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985). The Court *en banc* vacated the panel opinion and ordered rehearing. Order, No. 84-1176 (D.C. Cir. Oct. 31, 1985). Subsequently, the court granted the Commission's motion to remand the case in order to permit the agency to reexamine the bases for its minority and female preference policies. Order, No. 84-1176 (D.C. Cir. Oct. 9, 1986). On remand, the Commission initiated a notice of inquiry proceeding to consider these questions. See *Race and Gender Preferences*, 1 FCC Rcd 1315 (1986) (MM Docket No. 86-484), modified, 2 FCC Rcd 2377 (1987). In that notice, the Commission stated that it would hold in abeyance, pending the conclusion of its inquiry, all cases in which a racial, ethnic or gender preference could be dispositive.

4. Following the remand of the *Steele* case, the *Shurberg* panel asked the Commission to submit a brief setting forth its position on the constitutionality of the distress sale policy. In light of the then planned inquiry on comparative preferences and the fact that many of the same issues were presented by the distress sale policy, the Commission sought a remand of the record in the instant proceeding to consider the justification for the distress sale policy in MM Docket No. 86-484. On June 25, 1987, the Court remanded this proceeding to the Commission.

5. On December 22, 1987, the President signed into law House Joint Resolution 395 which contained the appropriations legislation for the Commission for fiscal year 1988.<sup>1</sup> This legislation appropriated money for Commission salaries and expenses with the following pertinent proviso:

That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended, 52 R.R.2d 1313 (1982) [sic]<sup>2</sup> and *Mid-Florida Television Corp.*, 60 F.C.C. 2d 607 Rev. Bd. (1978) [sic],<sup>3</sup> which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

6. In compliance with this legislation, the Commission has ordered MM Docket No. 86-484 closed, thereby terminating the reexamination of its licensing policies based on racial, ethnic or gender preferences. *Order*, FCC 88-17, adopted January 14, 1988. In order to comply with the legislation fully, the Commission also ordered that its licensing policies based on racial, ethnic or gender pref-

<sup>1</sup> *Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-202 (signed Dec. 22, 1978).

<sup>2</sup> 52 RR 2d 1301 (1982).

<sup>3</sup> 69 FCC 2d 607 (Rev. Bd. 1978).

erences that were in effect prior to September 12, 1986, be reinstated and that the presiding Administrative Law Judges, the Review Board, and the Office of the General Counsel process all licensing cases in a manner consistent with Commission policy in effect prior to September 12, 1986. *Id.*

7. ACCORDINGLY, IT IS ORDERED, That in view of the termination of MM Docket No. 86-484 and the Commission's reinstatement of its distress sale policy, the instant proceeding IS REACTIVATED and the Commission's ruling, 99 FCC 2d 1164 (1984), granting Faith Center's request to assign Channel 18 to Astroline IS REAFFIRMED, in compliance with the legislative directive set forth in House Joint Resolution 395, Pub. L. No. 100-202.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III  
Acting Secretary

In The  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee*

ASTROLINE COMMUNICATIONS CO.,  
*Intervenor*

PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING EN BANC

Appellee Federal Communications Commission respectfully petitions for rehearing of the decision of March 31, 1989 in the captioned case and suggests the appropriateness of rehearing by the Court *en banc*. This case involves a challenge to the FCC's longstanding "distress sale" policy, whereby applicants controlled by members of certain specified minority groups are permitted, in limited circumstances, to purchase a broadcast station from an existing licensee whose license has been designated for a renewal or revocation hearing. Since 1987 the policy has been mandated by statute.

In the decision, a panel of the Court, with Chief Judge Wald dissenting, found the distress sale policy unconstitutional. The two judges in the majority, although writing separately, agreed that the policy failed the narrowly tailored test because the policy, which makes race determinative in defining the class of eligible buyers, imposed an

undue burden on nonminorities.<sup>1</sup> The FCC believes that the majority erred in holding the distress sale policy unconstitutional.

CONCISE STATEMENT OF THE ISSUE AND ITS  
IMPORTANCE

This case presents for the first time the important issue whether a race conscious policy mandated by Congress can pass the narrowly tailored test when race is the only factor in determining who is eligible to participate in a program designed to promote diversity of viewpoint.<sup>2</sup> This specific issue is one aspect of the broader question concerning the degree to which the government can lawfully burden non-minorities when it adopts a race conscious policy in pursuit of diversity.<sup>3</sup> The issue is of particular importance here

<sup>1</sup> Judges Silberman and MacKinnon also agreed that the policy was not narrowly tailored to remedy past discrimination because the benefits under the program are not tied to the effects of past discrimination, and the program is thus not reasonably related to the governmental interest in remedying discrimination. As Chief Judge Wald notes (Wald opin. at 42), however, Congress in 1987 mandated the continuation of the policy as a means of promoting programming diversity and did not rely on the rationale of remedying past discrimination. Similarly, the Commission's brief justified the policy on the basis of the diversity rationale. And another panel of this Court has recently reaffirmed the continuing validity of the diversity goal. *See Winter Park Communications, Inc. v. FCC*, No. 85-1755 (D.C.Cir. April 21, 1989), slip opin. at 14. In this petition, we therefore focus on only those aspects of the holding of the panel majority that address the diversity rationale.

<sup>2</sup> The distress sale policy has been in existence since 1978 and has resulted in the Commission's approval of 38 distress sales to minority buyers. No one until now has challenged the constitutionality of the policy.

<sup>3</sup> This Court has addressed, and upheld on both statutory and constitutional grounds, the FCC's use of a race conscious policy in broadcast licensing where race is one of many factors the FCC considers in comparing applicants for a license. *See Winter Park Communications, Inc. v. FCC*, No. 85-1755 (D.C.Cir. April 21, 1989); *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied,

because this policy reflects a considered Congressional judgment.

In finding the distress sale policy unconstitutional, the majority did not defer to Congress' judgment that promoting broadcast diversity required limiting the use of the distress sale policy to minority buyers in the small numbers of situations each year where the FCC orders a hearing on a broadcast licensee's basic qualifications. This holding conflicts with *Fullilove v. Klutznick*, 448 U.S. 448 (1980) where the Supreme Court upheld, in the remedial context, a Congressional determination to allocate a small portion of construction contracts exclusively on the basis of race. Contrary to the conclusions of the panel majority, the burden that the distress sale policy imposes on nonminorities meets tests established in *Fullilove* and other Supreme Court opinions regarding programs designed to remedy past discrimination. A burden analysis should be no different when the program is designed to promote diversity.

The constitutional validity of the FCC's use of race conscious policies—particularly where, as here, the policy is mandated by Congressional legislation—is a matter of sufficient importance to warrant consideration by the Court *en banc*. The need for resolution of this question by the full Court is heightened here because this decision threatens other established race conscious policies that are man-

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470 U.S. 1027 (1985); *TV 9, Inc. v. FCC*, 495 F.2d 929, 935-38 (D.C.Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). The Court has held that diversity in broadcast programming—the FCC's stated goal in adopting race conscious policies—is a sufficiently compelling government interest to warrant the use of such programs (see *West Michigan*, 735 F.2d at 614), and that a race conscious program concerned with the licensing of broadcast stations is reasonably related to the goal of promoting programming diversity because Congress has found that there is a link between minority ownership and programming diversity. See MacKinnon opin. at 12-14; Wald opin. at 23-31. See also *West Michigan*, 735 F.2d at 610. Judge Silberman does not agree on this point. See Silberman opin. at 39-45.

dated by Congress and because of this Court's exclusive jurisdiction to review FCC licensing actions. See 47 U.S.C. § 402(b).

## BACKGROUND

### 1. Minority Preference Policies

The FCC has sought for many years to maximize diversity of ownership of broadcast stations in furtherance of the ultimate goal of maximizing the diversity of programming and viewpoint available to the public.<sup>4</sup> The Commission crystallized those goals in its *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), which accorded major significance to promoting diversity of broadcast expression through diversity of broadcast ownership. The Supreme Court subsequently held that "the 'public interest' standard [of the Communications Act] necessarily invites reference to First Amendment principles, . . . and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.'"<sup>5</sup>

In 1973 this Court instructed the Commission that the public interest in diversity of viewpoint should be implemented by increasing minority involvement in broadcast media ownership. *TV 9*, 495 F.2d at 937; see *West Mich-*

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<sup>4</sup> See, e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677 (D.C.Cir.), *cert. denied*, 342 U.S. 830 (1951).

<sup>5</sup> *FCC v. NCCB*, 436 U.S. 775, 795 (1978), quoting *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973) and *Associated Press v. United States*, 326 U.S. 1, 20 (1945). See also *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C.Cir. 1971).

igan, 735 F.2d at 610.<sup>6</sup> In response to TV 9's directives, the Commission concluded that minority ownership and participation should be treated as an enhancement to the standard comparative criterion of integration of ownership and management,<sup>7</sup> an element used in the comparative licensing process to evaluate which competing applicant is likely to provide the best practicable service to the public. See *WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978). In 1978, concluding that the dearth of minority broadcast owners continued to be an obstacle to the public interest goal of diverse programming, the Commission adopted the minority distress sale policy as an alternative to the lengthy and costly comparative hearing process. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 983 (1978).<sup>8</sup>

In 1982 Congress endorsed the FCC's minority ownership policies when it amended the Communications Act to require the Commission to provide minority ownership preferences in the newly authorized lottery process. Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (Sept. 13, 1982), codified at, 47 U.S.C. § 309(i)(3). See H.R. Conf. Rept. No.

<sup>6</sup> The FCC's race conscious policies are based on the FCC's conclusion that the broadcast audience, regardless of its racial composition, will benefit from exposure to programming that has a minority perspective. This basis for the policies should not be confused with the separate question of providing programming that is targeted to appeal to an audience composed of minorities. See, e.g., Wald opin. at 17.

<sup>7</sup> See *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395-96 (1965).

<sup>8</sup> Under this policy, the Commission permits a licensee whose basic qualifications have been designated for a hearing to transfer or assign its license to a qualified minority applicant at a distress sale price. The Commission has defined a distress sale price as being no more than 75% of the fair market value of the property. See *Lee Broadcasting Corp.*, 76 F.C.C.2d 462 (1980). The distress sale policy is applicable, however, only where no other party has filed a timely competing application. See *Clarification of the Distress Sale Policy*, 44 Radio Reg.2d (P&F) 479, 480 n.3 (1978).

765, 97th Cong., 2d Sess. 40-43 (1982)(citing with approval the FCC's 1973 *Minority Ownership Policy Statement*). More recently, in 1987 and 1988, Congress reaffirmed its support for such policies when it adopted, as part of appropriations legislation governing the FCC, a prohibition on the repeal or reconsideration of the distress sale policy and other minority preferences. See Pub. L. No. 100-202, 101 Stat. 1329 (1987); H.R. Conf. Rept. No. 498, 100th Cong., 1st Sess. 504 (1987); Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988).

In 1984, this Court upheld the comparative credit for minorities and noted favorably the existence of other FCC race conscious policies such as the distress sale program. *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601. And as recently as last month, the Court concluded that "the constitutional foundation for *West Michigan* remains intact." *Winter Park Communications, Inc.*, slip opin. at 14. Thus with the prodding, endorsement and encouragement of both this Court and the Congress, the Commission has for more than a decade interpreted the public policy favoring diversification to encompass advancing minority ownership as a means of enhancing diversity of viewpoints in broadcasting.

## 2. The Faith Center Distress Sale

Faith Center's license renewal application for WHCT-TV in Hartford, Connecticut was designated for hearing on basic qualification issues in 1980. There were no parties seeking to file a competing application for the license at that time.<sup>9</sup> Faith Center subsequently proposed to transfer the license to intervenor Astroline pursuant to the distress sale policy.

<sup>9</sup> It was not until 1983 that appellant Shurberg attempted to file an application competing with Faith Center, in violation of FCC rules that preclude acceptance of competing applications once a renewal application has been designated for hearing.

The Commission granted the distress sale transfer to Astroline and dismissed Shurberg's attempt to file a competing application. See *Faith Center, Inc.*, FCC 84-613 (Dec. 7, 1984) J.A. 1. In view of all of the administrative, judicial and legislative findings noted above, the Commission rejected Shurberg's argument that the distress sale policy was unconstitutional. Shurberg appealed.

### 3. The Panel Opinion In This Case

The panel remanded the proceeding to the Commission, finding that the distress sale policy is unconstitutional because it "is not narrowly tailored to remedy past discrimination or to promote programming diversity." *Shurberg v. FCC*, per curiam opinion at 2. Although the judges in the majority accompanied the short per curiam opinion of the Court with 67 pages of separate opinions, they agreed only that the distress sale policy is unconstitutional because it "unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interests it seeks to vindicate." *Ibid.*

Chief Judge Wald dissented from the judgment and opinions of the majority of the panel, stating that "[i]n casting off a thoughtfully conceived and monitored program aimed at attaining a legitimate congressionally mandated end, the majority has too rigidly applied Supreme Court affirmative action guidelines designed for other types of programs, ignored firm precedents in this circuit, and failed to credit the explicit intent of Congress." Wald opin. at 1.

### WHY REHEARING SHOULD BE GRANTED

The majority's holding in this case strikes down a Congressionally mandated policy. In its failure to give appropriate deference to Congressional determinations and in its conclusion that the distress sale policy unduly burdens nonminorities, the majority's holding conflicts with *Fullilove v. Klutznick*, 448 U.S. 448 (1980). And even the

majority of this sharply divided panel found only a paragraph's worth of reasoning on which they could agree. For these reasons, this case warrants the attention of the Court en banc.

The majority opinion appears to conclude that when the diversity rationale is the basis for a race conscious government policy, the "narrowly tailored" requirement established in Supreme Court opinions cannot be satisfied when race is the determinative factor for enjoying certain broadcast licensing opportunities. The Supreme Court in *Fullilove*, however, sustained a policy under which a benefit could be awarded solely on the basis of race.<sup>10</sup>

While *Fullilove*, of course, involved a race conscious policy in a remedial context and the present case arises in the diversity context, this difference does not change the effects of a race conscious policy. In other words, from the perspective of a nonminority who loses out under a race conscious program, it matters not whether the purpose of the program was to remedy past discrimination or to promote diversity. See MacKinnon opin. at n.9.

In *Fullilove* the Court also found that Congressional judgments establishing a race conscious policy deserve considerable deference. 448 U.S. at 472-73, 520 n.4. Specifically, Chief Justice Burger stated that although Congress had recited no "findings" in the statute at issue, "we are satisfied that Congress had abundant historical basis from

<sup>10</sup> In the pre-*Fullilove* decision in *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), four justices would have upheld the constitutionality of a minority set-aside and Justice Powell would not. Recently, in *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), the Court refused to uphold a set-aside, but was careful not to overturn the earlier approval in *Fullilove* of a Congressionally mandated set-aside. The distress sale program, like *Fullilove*, but unlike *Bakke* and *Croson*, involves a situation where Congress ordered an allocation of certain benefits exclusively on the basis of race. The Court in *Croson* emphasized the significance of a Congressional imprimatur on a race conscious program in discussing *Fullilove*.

which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.* at 478. In this case, Congress did make "findings."<sup>11</sup> And Congress had at least as abundant a basis for codifying the distress sale policy as it had for enacting the law upheld in *Fullilove*.<sup>12</sup>

In this case, two judges agreed that it is appropriate to afford a high degree of deference to a Congressional judgment even when the race conscious policy is based on the diversity objective rather than the objective of remedying past discrimination. Those judges thus deferred to the Congressional judgment that a link exists between minority ownership and programming diversity. See MacKinnon opin. at 12-14; Wald opin. at 25-26.

However, only Chief Judge Wald was prepared to afford a similar degree of deference to the Congressional judgment that the distress sale policy should be included among the methods for accomplishing the diversity objective. Judge MacKinnon did not defer to Congress on this judgment. No basis in law exists for giving deference in one instance, but not the other. Both judgments—i.e., that a link exists between minority ownership and programming diversity and that the distress sale policy is an appropriate

<sup>11</sup> See, e.g., S.Rep. 182, 100th Cong., 1st Sess. 76 (1987). The presence of specific Congressional judgments in *Fullilove* and in the present case serve in large part to distinguish these cases from the situations before the Supreme Court in *Croson* and *Wygant*, neither of which involved a Congressionally mandated program. See note 10 above.

<sup>12</sup> Congress held hearings prior to adoption of the 1987 legislation. See *Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. (1987). In addition, Congress was aware of the years of FCC and legislative consideration of this matter. A comparison of this substantial body of material with the evidence before Congress cited by the Court in *Fullilove* (448 U.S. at 458-67) demonstrates that Congress had at least as much specific factual evidence before it here as it did in *Fullilove*.

means for achieving the diversity objective—are relevant to the "narrowly tailored" analysis. Indeed, a case could be made for affording more deference to the decision to select a program in which race is the only factor because, as Chief Justice Burger's opinion in *Fullilove* declared, "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." 448 U.S. at 480 (citation omitted).<sup>13</sup>

We do not contend that a race conscious program in which a benefit is awarded exclusively on the basis of race could never be found to place an unlawfully heavy burden on nonminorities. The distress sale program, however, does not place an undue burden on nonminorities, either in the individual circumstances of this case or, more generally, from the perspective of all nonminorities interested in entering the broadcast industry. The panel majority erred when it concluded otherwise.

For example, Shurberg (or any other nonminority) has three options for acquiring a broadcast station—it can apply for a new station, buy an existing station, or file a competing application against a renewal application. The distress sale policy has no effect on applications for new stations or timely filed applications competing against renewals. Nor does the policy directly implicate all assign-

<sup>13</sup> In addition, Chief Justice Burger noted in *Fullilove* that the set-aside there in issue was "appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or reenactment." 448 U.S. at 489 (footnote omitted). The same can be said of the distress sale program ordered by Congress. When Congress first ordered the FCC to retain the program in 1987, it did so for one fiscal year. The following year, Congress ordered the program to continue but again this was done for Fiscal Year 1989 only. Thereafter, Congress could extend or eliminate the program, or leave its fate to the discretion of the Commission.

ments and transfers—i.e., sales—of existing stations.<sup>14</sup> In addition, distress sales represent only a tiny fraction of all assignment and transfer applications. From fiscal years 1979 through 1987, only 38 distress sales were approved by the FCC.<sup>15</sup> Over the same period, the FCC approved approximately 9,000 sales of broadcast stations.<sup>16</sup> Thus, during its existence, the minority distress sale policy has accounted for four tenths of one percent of all broadcast station sales; or, from the other perspective, 99.6% of all broadcast station sales did *not* involve the minority distress sale policy. Similarly, during the same period, roughly 20,000 license renewal applications were filed, but only 94, or 0.5% were designated for hearing and thus even eligible for disposition pursuant to the distress sale policy.<sup>17</sup> In sum, the distress sale policy operates to foreclose to non-minorities only a relative handful of the opportunities to acquire a broadcast station.

Even in those relatively few cases where a distress sale becomes a possibility because an incumbent licensee finds itself in difficulty before the Commission, nonminorities are not necessarily foreclosed from having the opportunity to acquire the station at issue. If a nonminority (or a minority for that matter) files a competing application before the incumbent's renewal application is designated for hearing,

<sup>14</sup> As noted, the policy is only available to facilitate the sale of broadcast stations whose applications already have been designated for hearing and are not subject to a competing application.

<sup>15</sup> See MacKinnon at 9, citing *Distress Sales Approved*, FCC Consumer Assistance & Small Business Div. (Oct. 18, 1988).

<sup>16</sup> The Commission actually approved 18,482 assignments or transfers during this period. See *Broadcast/Mass Media Application Statistics, Annual Reports of the Federal Communications Commission FY 1979—FY 1987*. Agency staff familiar with this area estimate that corporate reorganizations and similar technical changes represent at least one-half of the applications granted.

<sup>17</sup> See *Broadcast/Mass Media Application Statistics, Annual Reports of the Federal Communications Commission FY 1979—FY 1987*.

the distress sale option is not available. See note 7 above. Thus, a nonminority can prevent the distress sale policy from ever coming into play. For example, had Shurberg filed its competing application before the Commission designated Faith Center's renewal application for hearing, there would have been no distress sale. We note that timely filed competing applications against two of Faith Center's other stations did, in fact, prevent their sale under the distress sale policy. See *Faith Center, Inc.*, 89 FCC 2d 1054 (1982) and 90 FCC 2d 519 (1982).<sup>18</sup>

A comparison of the foregoing statistics with similar information considered in *Fullilove* further demonstrates that the impact of the distress sale policy on nonminorities is not so great as to make the policy unconstitutional. Chief Justice Burger concluded in *Fullilove* that the burden on nonminority firms was "relatively light" because the percentage of funds available to minorities alone was a minuscule percentage (0.25%) of the amount spent on construction in the United States. 448 U.S. at 484-85 n.72. The same is true with the distress sale program. Although Congress did not limit the number of broadcast stations that could be transferred under the distress sale program, Congress could reasonably know from the Commission's experience that there have been, on average, fewer than 5 distress sales per year—approximately 0.20% of renewal applications filed each year.

Even where an opportunity for a distress sale does materialize, it does not, contrary to Judge MacKinnon's conclusion, "operate[ ] more like a firing plan. . . ." MacKinnon

<sup>18</sup> Even when the distress sale option is exercised, nonminorities can seek to become a limited partners in a minority controlled entity and share in whatever financial benefits arise from operating a broadcast station on that frequency. See *Policy Statement*, 9 F.C.C.2d 849 (1982). Indeed in this case, the minority general partner held only a 21 per cent ownership interest in Astroline Communications Co. See Silberman opin. at 8.

opin. at 16. Instead, as Judge Wald correctly observed, "the distress sale policy involves entry into a market [and] is far more analogous to 'hirings' than to 'firings.' ... Because of the unique and unpredictable nature of such situations, a distress sale can hardly be said to disrupt the settled expectations of potential licensees." Wald opin. at 38.<sup>19</sup> Moreover, as Chief Justice Burger stated in *Fullilove*, "[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." 448 U.S. at 484, quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 (1976).<sup>20</sup>

The panel majority, however, has adopted such a low threshold of burden on nonminorities in construing the narrowly tailored standard as to invalidate almost any race conscious programs that a federal agency or Congress could devise. Or, as Judge Wald observed, "My colleagues' approach suggests—erroneously in my view—that affirmative action is permissible only when nothing very much is at stake, when such a superabundance of opportunity exists that no one need go without." Wald opin. at 40 n.47. The panel majority's view is in error and in conflict with Supreme Court opinions. The majority's error is a serious matter that warrants the attention of the Court *en banc*.

<sup>19</sup> Recent events, in fact, indicate that what Shurberg lost was not the right to acquire this station, but to participate in a comparative hearing with at least four other parties who also desire the station. That is the number of competing applications that were filed recently when this license came up for renewal. Action on those applications has been deferred pending the outcome of this litigation.

<sup>20</sup> See also *Wygant*, 476 U.S. at 280-81 (opinion of Powell, J.) "As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." Wald opin. at 36-37.

## CONCLUSION

In consideration of the foregoing, the Court should grant rehearing *en banc* in this case.

Respectfully submitted,

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May 15, 1989

JA-110

Letter to Constance L. Duprè, Clerk, from Daniel M. Armstrong, Associate General Counsel, May 22, 1989, and attachment

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

May 22, 1989

IN REPLY REFER TO:

Constance L. Duprè, Clerk  
United States Court of Appeals for  
the District of Columbia Circuit  
Washington, D. C. 20001

Re: *Shurberg Broadcasting v. FCC*,  
D.C.Cir. No. 84-1600

Dear Ms. Duprè:

Footnote 12 on page nine of the petition for rehearing recently filed by the Commission in the referenced case refers specifically to certain 1987 Congressional hearings. At the request of the Court, I have enclosed 20 copies of the pertinent pages of those hearings. These pages may be found at: *Hearings on H.R. 2763 before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. Part 1 at 17-19, 75-77 (1987). Footnote 12 also alluded to earlier legislative consideration of race conscious communications policies. This was a reference to: *Minority-Owned Broadcast Stations—Hearings on H.R. 5373 before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media—Hearings before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media—Hearings on H.R. 1155 before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess.

JA-111

(1983); H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. (1982).

Sincerely,

/s/ Daniel M. Armstrong  
Daniel M. Armstrong  
Associate General Counsel

enclosure

cc: all counsel

Senate Hearings  
Before the Committee of Appropriations  
Commerce, Justice, State, the Judiciary, and Related  
Agencies Appropriations

*Fiscal Year 1988*

100th CONGRESS, FIRST SESSION

H.R. 2763

PART 1 (Pages 1-1087)

ARMS CONTROL AND DISARMAMENT AGENCY  
DEPARTMENT OF COMMERCE  
DEPARTMENT OF STATE  
FEDERAL COMMUNICATIONS COMMISSION  
FEDERAL MARITIME COMMISSION  
INTERNATIONAL TRADE COMMISSION  
MARINE MAMMAL COMMISSION  
MARITIME ADMINISTRATION  
OFFICE OF U.S. TRADE REPRESENTATIVE  
UNITED STATES INFORMATION AGENCY

\* \* \*

done specifically vis-a-vis Channel 18. But I think it has been quite a period of time that has passed since Astroline Communications took that station over. It seems to me something is owed. I don't care what the decisions are. That is not my business. That is your business. In terms of times consumed, that is my business as far as constituents are concerned, and I appreciate your paying attention to that.

Mr. FOWLER. Senator, I appreciate your position. I will go back and see if we can move that proceeding along or to make sure we can do that.

#### AUCTIONS

Senator WEICKER. Lastly, I was listening to the dialogue between you and Senator Rudman. I don't know what the resolution to that is. I would be anxious to hear what Senator Rudman's idea is. The lottery idea was awful.

It seems to me that the auction concept as raised by the Chairman does have merit in trying to take care of the various deficiencies existent in the other two systems.

If there is a fourth idea, I would like to find out about it.

Senator RUDMAN. You will. [Laughter.]

Senator WEICKER. All I am saying is, I don't think the chairman is off the wall in what he is suggesting. I think what he is trying to suggest are some proven deficiencies in the other systems that have been used. To that extent, I am glad somebody else is thinking about something new in that regard.

Senator HOLLINGS. Senator Lautenberg?

## MINORITY PREFERENCES

Senator LAUTENBERG. I appreciate it, Mr. Chairman, and I appreciate the willingness of my colleagues to give me an opportunity to get in and get out.

Mr. Fowler, since the airwaves are so scarce, you and the Commission have a responsibility to make sure that they are used to reflect the diversity of views and the diversity of background and interests in our country.

One way is to promote the diversity of ownership, and that is to make radio and TV stations available to qualified blacks and other minorities, as well as others.

A mere 2 percent of the broadcast stations are owned by minorities, but I can tell you that those stations serve a very important need to express a particular viewpoint and to serve those special needs. The Commission has had policies in place to give minorities and women an edge. In 1982, the Congress agreed; it required the FCC to award preferences to minorities when it issued broadcast licensing by lotteries, and, of course, we agreed.

The court in the TV 9 case and the West Michigan case approved minority preferences. Now the FCC is conducting an inquiry. It wants to know if a minority preference is needed to promote diverse programming, but the Congress has said that apparently that is not good enough.

Apparently, you don't like what the Congress has said or if you disagree, paragraph 18 of your notice says, "We solicit comment on whether the Commission is bound by congressional findings of constitutionality."

Does that mean that the FCC puts itself in a position above the Congress, above the courts, to declare laws unconstitutional and to refuse to enforce them? It is a dilemma for us.

Mr. FOWLER. No, no, Senator, it doesn't mean that at all. It means the proverbial rock and the hard place, we

need to look at the gender and race preferences on both public policy ground and Constitutional grounds.

We have a number of cases that have come up in the Supreme Court dealing with gender and race as preferences that we have to also think about, too. On the other hand, we have Congress having said, for example, in the 1982 law which you referred to that we shall provide preferences when we use the lottery to issue licenses for low power television stations.

So that is the question, exactly. We are trying to find out what our duties are under the law, and we are getting advice from two very important bodies.

Senator LAUTENBERG. Don't you believe that you ought to take the mandate as given to you by Congress at this point while the other issues are being considered by the Judiciary?

Mr. FOWLER. Well, we haven't in any way changed our policy in the meantime.

Senator LAUTENBERG. What is being done?

Mr. FOWLER. Problems are still applied in adjudicatory cases. All we have said is if the judge decides a particular applicant wins, we want to hold those cases in abeyance pending what happens with this court case.

Actually, we have two of them that have raised the question of (a) whether or not race and gender-based preferences are Constitutional; and (b) whether or not they are good public policy.

One of the things I proposed—by the way, Senator, having dealt with minorities myself and as a practicing attorney and having represented a good number of them where I have to essentially float them, if you will, because they didn't have money in many of these competitive hearings—I proposed that we take some of the money from the spectrum auctions Senator Rudman has hesitancy about

and use that as a revolving fund to provide, in effect, financing for people who are below a certain income level. I believe this would do more to accelerate minority ownership in telecommunications than anything we have done up to now. All the things you have mentioned we have done and a lot more. We only have 2 percent of the Nation's radio and television stations in minority hands, and that is because they have got to have the money in order to be able to go through litigation in order to get the preferences. They have got to have the staying power. They don't have that.

#### MINORITY PREFERENCES

How much better it would be and what a better world it would be if we could take several hundred million dollars and put it in a revolving fund of loans that went out to people who met a "means" test. They could go out and buy stations in markets that they were interested in. I think we could do more to raise that number to, let's say, 10 percent in 3 or 4 years than we have done now fiddling around on the margins in the past 15 years.

That was one of my ideas. I still think it is a good idea. Of course, it ties into spectrum auctions here.

Senator LAUTENBERG. I don't want to deal with Senator Rudman's inquiry. He is of clear thought, and he will see that we—

Mr. FOWLER. I also wanted to put them into supporting public broadcasting. [Laughter.]

Senator RUDMAN. Do you have more sweeteners for us, Mr. Chairman? [Laughter.]

Senator LAUTENBERG. How about taking care of my particular problem in the process, and then we will back off to the others? The Steel case dealt with gender, not minorities, am I correct?

Mr. FOWLER. Pardon me?

Senator LAUTENBERG. The Steel case?

Mr. FOWLER. Yes, sir.

Senator LAUTENBERG. Why do you feel that we can't proceed, then? In my view, there seems to be no question about whether or not you have the ability to make the decisions in the case of the minority.

Mr. FOWLER. Because the Steel case also discussed the very lengthy question of race-based preferences, although it didn't hold on that. Underpinning gender preferences is the same basis we use to justify race-based preferences. The two are implicated.

If you are looking at one, you are looking at the other. Constitutionally, from public policy, we felt it was imperative, as we looked at the Supreme Court case law, including the decision made in 1986 in the summer. We believe it was imperative to look at both of them at the same time, particularly since in many of these proceedings, you have both gender- and race-based preferences involved in comparing one applicant with the other.

So it seems, as a matter of fairness, imperative that we look at both of them at the same time as well as the facts; that the bases are the same for both.

Senator LAUTENBERG. I hope we can resolve the issue, because if you do not support the principle, then we cannot make sure that we have the opportunity for minorities and women to own these licenses and to present the diversity of views that I frankly think is essential if we are going to use our resources fairly.

. . .

#### QUESTIONS SUBMITTED BY SENATOR LAUTENBERG

##### FM RADIO

*Question:* The New Jersey Class A Broadcasters Association, representing a majority of our state's FM broad-

casters, recently filed a proposal to allow a blanket power increase to 6 kilowatts power at 100 meters height (or 4 kilowatts at 125 meters) for all Class A broadcast stations from the present limits of 3 kilowatts at 100 meters height.

This proposal brought to light the state's past and present broadcast allocation problems and sought to address to some degree the increasing problems of New Jersey markets outgrowing the signal of the Class A FM stations designed to cover them. The problem is particularly acute in New Jersey, where most of the state receives most of its local, New Jersey-oriented FM radio service from Class A stations. The history of allocations shortchanged New Jersey.

The Commission chose to dismiss the proposal without comment. What kind of relief is the Commission prepared to offer Class A broadcasters in New Jersey? Does the Commission agree that the allocation of radio stations historically shortchanged New Jersey? What avenues are available to the New Jersey broadcasters to enable them to reach their growing audiences?

*Answer:* The New Jersey Class A Broadcasters Association's proposal to increase the allowable maximum Class A operating power was filed in a recently concluded proceeding in MM Docket No. 86-144, *In the Matter of FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations*. Because the Commission initiated the Docket 86-144 proceeding for the limited purpose of seeking comments on proposals to adjust and review inconsistencies in certain of its FM technical rules in light of its action in Docket 80-90, proposals such as that by New Jersey Class A Broadcasters Association for blanket increases were not contemplated and thus the Commission found the proposal to be outside the scope of the proceeding. Further, it was deemed inappropriate to decide such proposals because the Commission lacked an adequate record on which to base action. Finally, the Commission's staff also

determined that bilateral agreements with Canada and with Mexico would be required in order to implement such increases.

It is anticipated that this proposal may be refiled at some future date and will contain further engineering analyses of the effect of such upgrades will have on the coverage of other existing stations. In addition, as noted, extensive international negotiations would be necessary in order to provide Class A power increases to the Canadian and Mexican border areas.

As for the history of New Jersey allocations and future solutions, the Commission has been aware of the concern that there are insufficient local outlets for the residents of New Jersey. The Commission continues to seek to provide additional outlets for New Jersey and all other states.

#### MINORITY BROADCASTERS

*Question:* At the hearing, you stated that the court in *Steel v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985) raised questions about the basis for race-based preferences in the award of broadcasting licenses. The Circuit stated in the case: "Under our decisions, the Commission's authority to adopt minority preferences even apart from the lottery process—at least where such preferences are tied to minority participation in the management of broadcast facilities—is clear." 770 F.2d at 1196. In light of that statement, what is the basis for the FCC to expand its inquiry to include an inquiry of its authority in the area of minority preferences as opposed to gender-based preferences?

*Answer:* In *Steele*, a divided panel of the D.C. Circuit Court of Appeals in throwing out the Commission's women's preference policy criticized the *assumptions* underlying the FCC's minority preference policy. This was because the women's preference scheme was a direct outgrowth of the Commission's minority preference policy, whose origins can be traced back to 1972 and the TV-9 case.

In *TV-9*, the Commission refused to award a minority preference without a demonstration that the proposed minority ownership would enhance program diversity. The D.C. Circuit reversed the Commission, and told the FCC that it should grant a preference to the minority owner based solely on the assumption that minority ownership and participation would lead to program diversity. No factual record was developed on the issue. Since then, the Commission has followed the Court's mandate in *TV-9*. Preferences are now routinely granted to minorities without requiring that a nexus to program diversity be shown. In 1978, the FCC's review Board extended the minority preference policy to females on the theory that the logic of *TV-9* applied equally to women. Thus, a nexus to program diversity again was assumed without conducting a factual inquiry. The Commission acquiesced to that extension of the female preference policy in subsequent cases. But until the *Steele* court criticized the assumptions underlying the minority and female preference policies neither the Commission nor the Board ever discussed or examined further the assumptions which the policy was based.

In summation, the basis for the Commission to expand its inquiry on gender-based preference to include an inquiry into minority-based preferences is that the assumptions and premises underlying gender-based preferences are the same assumptions and premises upon which the minority preference rests. Thus, on examination of the assumption and premises underlying gender-based preferences necessarily involves an examination of minority-based preferences.

*Questions:* Specifically, how does the Commission plan to examine whether a "nexus" exists between minority ownership and diversity in programming? Does the commission plan to examine the content of programming? How would such an examination differ from the kind of judgments

that the Commission believed violated the First Amendment in the Fairness Report?

*Answer:* In its brief submitted to the *Steele* court, the Commission concluded that racial and gender classification may not be based solely on the assumption that integrated minority/female owners will result in increased content diversity. The Commission concluded, therefore, that an inquiry should be conducted to reexamine the legal and factual predicates of our policies. To that end, the Commission issued a Notice of Inquiry reexamining the FCC's comparative licensing, distress sales, and tax certificate policies premised on racial, ethnic or gender classifications. As part of that inquiry, the Commission sought to determine whether there is a nexus between minority/female ownership and viewpoint diversity, and whether such ownership is necessary to achieve that goal. The Commission developed a series of questions designed to elicit evidence on the nexus issue.

The following list of questions from the Notice of Inquiry deal specifically with programming:

"To what extent is the relationship between integrated minority/female ownership and increased availability of minority/female perspectives and programming empirically demonstrable? Is there, for example, a demonstrable difference in the amount or nature of minority-oriented programming broadcast by minority-owned stations and that broadcast by non-minority-owned stations under similar market conditions, such as where there is a significant minority population? How should minority or female-oriented programming be defined for purposes of this analysis? Do these definitions apply to all media?"

While the foregoing list of questions does involve an examination of programming, that inquiry is a one-time study

designed to elicit empirical evidence to determine whether there is a nexus between minority/female ownership and viewpoint diversity as required by the Constitution and to focus attention on the effectiveness of the minority/female ownership policies in achieving their intended goals. On the other hand, the Fairness Doctrine, which requires that broadcast stations (1) broadcast discussion of the most important controversial issues in the station's coverage area; and (2) provide reasonable opportunity for the presentation of contrasting views on these issues, limits the First Amendment rights of the broadcasters based upon some notion of fairness which necessarily involves the continuing government oversight and intrusion into the editorial judgment of broadcasters.

*Question:* If the Commission determines that the distress sale policy is unconstitutional, will it apply its decision prospectively? What will be the fate of the WHCT-TV license? Has the Commission considered the problems that would result from retroactive application?

*Answer:* No decision has been made to date with respect to the general question of the constitutionality of the distress sale policy since it is the subject matter of the pending *Inquiry*. In addition, no consideration has been given up to this point to applying any decision retroactively in a manner that would reopen proceedings already concluded. Generally speaking, if changes in the policy are adopted, they would be applied prospectively, subject only to applicable constitutional requirements.

As a consequence of the Court's remand of the *Shurberg* (WCHT) case, further input from the parties to the case has been sought as to what further procedural or substantive steps should be taken to resolve the proceeding. Because this is a restricted adjudicatory proceeding and because no decisions have been made as to how to respond to the Court's remand order, it would not be appropriate

to comment further at this point on the likely final disposition of the WHCT-TV license.

#### AM AND DAYTIME BROADCASTERS

*Question:* Last spring, the FCC issued a Report on the Status of the AM Broadcast Rules. One section of the report referred to the modifications of rules which authorized post-sunset operation of daytime-only stations. The report stated:

*"While the new rule has brought substantial benefits to both stations and listeners, they fall short of removing the distinction between daytime-only and full-time stations. Nor does such operation necessarily represent the furthest step the Commission could take consistent with its interference protection standards."* [emphasis added]

The report went on to discuss the use of the same computer resources which were used in the post-sunset study to determine the power which could be used under full nighttime conditions without causing interference.

What steps has the FCC taken since the publication of this report to study and recommend power levels under full nighttime conditions? If nothing has been done why not? What future plans does the FCC have to address this issue?

*Answer:* On January 17, 1987, the Mass Media Bureau presented a detailed report to the Commission summarizing the comments received from the industry

\* \* \*

No. 89-700

Supreme Court, U.S.  
FILED

FEB 9 1990

JOSEPH F. SPANIOL, JR.  
CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

*Respondent.*

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**BRIEF FOR PETITIONER**

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### QUESTIONS PRESENTED

1. Whether an affirmative action program implemented by the Federal Communications Commission to enhance diversity in programming by increasing minority ownership of broadcast stations is unconstitutional because it is assertedly not "narrowly tailored" to serve a concededly compelling governmental purpose.

2. Whether a reviewing court may disregard Congress' express approval and adoption of such a program.

## LIST OF PARTIES

The parties in the court below were petitioner Astroline Communications Company Limited Partnership, respondent Shurberg Broadcasting of Hartford, Inc., and the Federal Communications Commission. Petitioner Astroline Communications Company Limited Partnership is a limited partnership comprising two general partners, Richard P. Ramirez and WHCT Management, Inc., and one limited partner, Astroline Company.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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**No. 89-700**

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ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit**

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**BRIEF FOR PETITIONER**

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 876 F.2d 902, and is reprinted in the appendix to the petition for a writ of certiorari at 1-112a. The opinions of the Federal Communications Commission are reported at 68 F.C.C.2d 979 and 99 F.C.C.2d 1164, and are reprinted in the appendix to the petition for a writ of certiorari at 113-129a and 130-140a, respectively.

## JURISDICTION

The judgment of the court of appeals (141a) was entered on March 31, 1989. Timely petitions for rehearing, and suggestions for rehearing *en banc*, were denied on June 16, 1989 (143a, 155a). On September 13, 1989, the Chief Justice ordered that the time within which to file a petition for a writ of certiorari be extended to and including Sunday, October 29, 1989. Pursuant to Sup. Ct. R. 29.1, the petition in this case was filed on October 30, 1989, the next day not a Sunday or a federal legal holiday. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fifth Amendments to the Constitution, the Communications Amendments Act of 1982, 47 U.S.C. §§ 309(i)(3)(A) and (C)(ii), the Joint Resolution, Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987), and the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186 (1988), are set out at 161a *et seq.* of the appendix to the petition for a writ of certiorari. The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-21 (1989) is set out as an appendix to this brief.

## STATEMENT

### A. Development of the distress sale policy and the FCC's other minority ownership policies.

More than a decade ago, the Federal Communications Commission ("FCC") found that the broadcast media failed adequately to reflect the views of minorities because minorities were acutely underrepresented among owners of broadcast stations. Minorities owned fewer than one per cent of U.S. broadcast stations, even though they comprised about 20 per cent of the nation's population. The FCC had attempted to stamp out employment discrimination in the broadcast industry. It had also required licensees to consult with leaders of the minority communities in their service areas to ascertain community interests and develop responsive programming. Despite its efforts, the FCC was "compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media." *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979, 980 (1978) (133a) ("1978 Policy Statement").<sup>1</sup> This situation, the FCC found, was "detrimental not only to the minority audience but to all of the viewing and listening public," and inconsistent with the FCC's obligations under the First Amendment and Section 1 of the Communications Act of 1934, 47 U.S.C. § 151, to advance diversity of broadcast programming. 68 F.C.C.2d at 980-81 (133a).

The FCC's view of its statutory and constitutional responsibilities to increase minority participation in broadcasting stemmed in part from the promptings

<sup>1</sup> References to the Appendix to the Petition for a Writ of Certiorari are given as "\_\_\_ a."

of a series of decisions by the United States Court of Appeals for the District of Columbia Circuit which, under 47 U.S.C. § 402(b), possesses exclusive jurisdiction to review the FCC's licensing decisions. In *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 860 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), the court admonished the FCC not to be content with regulatory supervision of existing licensees, but also to "seek in the public interest to certify as licensees those who would speak out with fresh voice, would most naturally initiate, encourage and expand diversity of approach and viewpoint." In *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213-14 n.36 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972), the court observed that only a dozen out of the 7,500 broadcast licenses then in force were held by minorities, a "dismaying situation" that helped persuade the court to invalidate an FCC policy that would have given an insurmountable advantage to incumbent licensees. "As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies." *Id.*

The court soon thereafter held that minority ownership, when the owners fully participated in the station's management, should count in the applicant's favor in a comparative hearing.

It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority

group media entrepreneurship. . . . [W]hen minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded.

*TV 9, Inc. v. FCC*, 495 F.2d 929, 937-38 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). See also *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975) ("black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry") (footnote omitted).

In its 1978 *Policy Statement*, the FCC found that despite the promulgation and enforcement of its equal employment opportunity and ascertainment rules, and despite the award of merit in comparative hearings to prospective minority licensees, "the continuation of an extreme disparity between the representation of minorities in our population and in the broadcasting industry requires further Commission action." 68 F.C.C.2d at 982 (137a) (footnote omitted). That action included, in part, the adoption of the distress sale policy at issue here.<sup>2</sup>

The distress sale policy permits licensees whose licenses are designated for a revocation hearing, or whose renewal applications are designated for hearing on basic qualification issues, to transfer or assign their licenses at a discounted "distress sale" price to purchasers with a significant minority ownership interest.

<sup>2</sup> At the same time, the FCC adopted a policy of issuing tax certificates to licensees who proposed to transfer their licenses to parties with a significant minority interest. A tax certificate permitted the transferor to defer capital gains taxation on the transaction. 68 F.C.C.2d at 983 (137-38a).

68 F.C.C.2d at 983 (138a).<sup>3</sup> The policy gives licensees at risk for revocation the incentive to relinquish their licenses through a distress sale (and salvage some of their investment), while simultaneously serving the public interest by increasing the number of minority owners of broadcast stations.<sup>4</sup> The discount forces the departing licensee to pay a penalty for its apparent failure to discharge its responsibilities, while facilitating the minority broadcaster's acquisition of the license. At the same time, the FCC conserves its resources by encouraging questionable licensees to exit without years of hard-fought proceedings in which the licensee seeks to ward off revocation.

The FCC has not earmarked any number or percentage of licenses for distress sale treatment. The FCC has not (and cannot) require any licensee to agree to a distress sale; the licensee retains the option of defending its qualifications through the hearing process.

In 1982, Congress expressly endorsed the FCC's several policies aimed at increasing minority owner-

<sup>3</sup> Initially, purchasers qualified for the distress sale policy if a minority owned more than a 50 per cent, or controlling, interest in the purchasing entity. 68 F.C.C.2d at 983 (138a). In 1982, the FCC extended eligibility for the policy to limited partnerships in which the general partner was a member of a minority group and owned at least 20 per cent of the entity. *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

<sup>4</sup> Ordinarily, a licensee whose basic qualifications are in question cannot sell or assign its license, because "a licensee or permittee has nothing to assign or transfer unless and until he has established his own qualifications . . . ." *Northland Television, Inc.*, 42 Rad. Reg. 2d (P & F) 1107, 1110 (1978). See also *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

ship. Congress passed the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, empowering the FCC to substitute a lottery for the comparative hearing process, but requiring any lottery system to perpetuate the FCC's minority ownership policies. The Conference Committee observed that as of the end of 1981, only about two per cent of broadcast stations, commercial and noncommercial, were minority-owned. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43-44, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2237, 2287-88. The Committee declared:

The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.

*Id.* at 43. The Committee referred expressly to the FCC's promulgation of the distress sale policy as "[e]vidence of the need for such preferential treatment [that] has been amply demonstrated by the Commission, the Congress, and the courts." *Id.* at 44.

In *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), the D.C. Circuit upheld against constitutional challenge a preference for a minority applicant in a comparative hearing where the service area had only a small minority community. The court accepted the FCC's view that the public interest is served by providing "the listening audience as a whole with programming choices that reflect a diversity of

viewpoints and perspectives," and not simply by "providing particular minority audiences with minority broadcasters responsive to their needs." *Id.* at 609. The court found that

over the past decade the courts, the Commission, and the Congress have all concluded that promotion of minority owned broadcast media facilities, where the minority owner will be fully involved in broadcast management, is an important public policy objective within the FCC's "public interest" mandate.

*Id.* at 607.

The *West Michigan* court found in Congress' adoption of the Communications Amendments Act two years earlier both confirmation of the FCC's view of its public interest responsibilities, and powerful evidence of the constitutionality of the FCC's minority ownership policies. The court found that Congress had "explicitly mandated that the FCC follow a minority ownership promotion program that would clearly rest on the very view of the public interest that the Commission has here followed . . . ." *Id.* at 612. Relying on *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the court held: "Any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *Id.* at 615.<sup>5</sup>

<sup>5</sup> In *Loyola University v. FCC*, 670 F.2d 1222, 1225-26 (D.C. Cir. 1982), the court held that the FCC had properly considered the expansion of minority ownership as a public interest factor weighing in favor of modification of its clear channel rules to permit additional stations to use those channels. The court cited with evident approval the FCC's conclusion that "all three

In *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), rehearing *en banc* granted (Oct. 31, 1985), the panel, in an opinion by Judge Tamm in which Judge Scalia joined, found that the FCC's enhancement in comparative hearings for female applicants exceeded its authority under the Communications Act. By contrast, Judges Tamm and Scalia found no reason to disturb the D.C. Circuit's long history of approval of the FCC's minority ownership policies, expressly including the distress sale policy: "Under our decisions, the Commission's authority to adopt minority preferences even apart from the lottery process—at least where such preferences are tied to minority participation in the management of broadcast facilities—is clear." *Id.* at 1196.

In 1986, however, the FCC concluded that the constitutionality of its minority ownership policies was open to question, and asked the D.C. Circuit *en banc* to remand the *Steele* case to the FCC for a reconsideration of those policies. The court remanded the case, and the FCC opened a rulemaking docket for a reexamination of its policies. *Reexamination of the Commission's Comparative Licensing, Distress Sales, and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd. 1315 (1986), modified, 2 F.C.C. Rcd. 2377 (1987). The FCC also sought and obtained remands for the same purpose in both the instant case and in *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), petition for cert. granted *sub nom. Metro Broadcasting Inc. v. FCC*, 58 U.S.L.W. 3427 (U.S.

branches of government have recognized the importance of fostering minority participation in ownership and operation of broadcast stations." *Id.* at 1226 n.9.

Jan. 8, 1990) (No. 89-453), in which a disappointed nonminority applicant had challenged the constitutionality of minority enhancements in a comparative hearing.

Congress then interceded and forbade the FCC to use its appropriated funds

to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, *distress sales* and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses . . .

Pub. L. No. 100-202, 101 Stat. 1329 (1987) (emphasis added) (162a). The Senate Appropriations Committee Report said: "The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals." S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). Congress has since twice reenacted a similar ban on disturbing the distress sale policy and the FCC's other minority ownership policies, through fiscal 1989 and fiscal 1990. Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988) (163a); Pub. L. No. 101-162, 103 Stat. 1020-21 (1989) (appended hereto).

After passage of the 1987 appropriations legislation, the FCC closed its reexamination of its minority ownership policies. The FCC then defended the constitutionality of those policies in comparative hearings in *Winter Park*, and the distress sale policy in the instant case. The D.C. Circuit upheld the comparative hearing policy in *Winter Park*, holding that the "issue

. . . of the FCC's use of a qualitative enhancement for minority ownership is easily resolved" under the controlling authority of *West Michigan*. 873 F.2d at 353. The court found that the policy, as upheld in *West Michigan*, was not undermined by this Court's decisions in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) or *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986), and that the preference's constitutionality was reinforced by Congress' "express approval" in the 1982 lottery statute and the 1987 appropriations legislation. *Winter Park*, 873 F.2d at 355.

#### B. Application of the distress sale policy in this case.

##### 1. The FCC's decision.

In November 1980, the FCC designated the renewal application of Faith Center, Inc. to operate WHCT-TV (Channel 18 in Hartford, Connecticut) for hearing to determine whether Faith Center was qualified to remain a licensee. *Faith Center, Inc.*, 99 F.C.C.2d 1164, 1166-67 (1984) (115-116a). Faith Center twice applied for, and received, the FCC's authorization to effect a distress sale of the license to minority buyers, but neither sale was consummated. *Id.* (116a).

In December 1983, Shurberg Broadcasting of Hartford, Inc. and its principal, Alan Shurberg (collectively "Shurberg") filed a competing application for Channel 18. Shurberg petitioned the FCC to designate its application for a comparative hearing with Faith Center's renewal application, arguing (among other points) that the distress sale policy was unconstitutional. *Id.* at 1167, 1170-71 (117a, 122a). In June 1984, Faith Center again requested the FCC's authorization to accomplish a distress sale, this time to Astroline Com-

munications Company Limited Partnership ("Astroline"), a minority-controlled limited partnership whose principal general partner was Richard P. Ramirez. *Id.* at 1166-67, 1172-73 (116-117a, 125a).

In December 1984, the FCC denied Shurberg's petition, rejecting its constitutional arguments as "without merit." *Id.* at 1170-71 (122a). The FCC reiterated its finding in its 1978 *Policy Statement* that created the distress sale policy of "an acute underrepresentation of minorities among the owners of broadcast stations and that views of racial minorities were inadequately represented in the broadcast media." *Id.* at 1171 (122a). The FCC noted that "increasing minority ownership of broadcast stations would result in diversity of control of a limited resource, the broadcast spectrum, and would result in a more diverse selection of programming for the entire viewing and listening public." *Id.* at 1171 (122-123a).

The FCC also pointed to Congress' passage of the Communications Amendments Act of 1982, with its express requirement that significant preferences for minority applicants be incorporated into any lottery system that might supplant the comparative hearing process. *Id.* at 1171-72 (123-124a). The FCC observed that the Conference Report had relied on the FCC's 1978 *Policy Statement*, including the factual basis developed by the FCC Minority Ownership Task Force, *Report on Minority Ownership in Broadcasting* (1978), "as evidence of the need for the type of preferential treatment of minorities contained in the legislation." *Id.* at 1171 (124a). The FCC said: "Thus Congress, which has the broadest remedial power of any governmental entity, has recognized the need for and

approved the implementation of the minority ownership policies set forth in the 1978 policy statement." *Id.* at 1171-72 (124a) (footnote omitted).

Shurberg also challenged Astroline's *bona fides* as a minority-controlled purchaser. The FCC examined Astroline's ownership structure, and determined that Mr. Ramirez's role as Astroline's controlling general partner complied with the FCC's established criteria for limited partnerships' eligibility for distress sales. *Id.* at 1172-73 (125-126a). The FCC approved Faith Center's application for a distress sale to Astroline, on the condition that Astroline establish its qualifications to be a licensee (which it did). *Id.* at 1172 (124a).

## 2. The D.C. Circuit's decision.

Shurberg filed a petition for review in the D.C. Circuit, and four years elapsed between the filing of the petition and the court's decision. In the meantime, as noted above, the FCC obtained a remand of the case for reconsideration of the constitutionality of the distress sale policy, and terminated that inquiry in response to Congress' 1987 appropriations legislation forbidding the FCC to repeal or alter the distress sale policy, a prohibition that Congress has reenacted for the two succeeding fiscal years and that remains in effect today.

In March 1989, a divided court of appeals found the distress sale policy unconstitutional. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989). Judges Silberman and MacKinnon, who constituted the majority, agreed only on a one-paragraph *per curiam* opinion that said, in pertinent part, that

the FCC's minority distress sale program unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote programming diversity. Specifically, the program unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interests it seeks to vindicate.

876 F.2d at 902 (2a). Judge Silberman and Judge MacKinnon each wrote separately; Chief Judge Wald dissented.

Judge Silberman wrote that the distress sale policy could not be justified as a remedy for discrimination because neither the FCC nor the Congress had linked minority underrepresentation in the broadcast industry to discrimination by the FCC itself, or to particularized discrimination in the broadcast industry. *Id.* at 914 (27a). He rejected societal discrimination as a basis for the program, doubting "that Congress may act without *some* quantum of particularized evidence of the effects of societal discrimination in the relevant industry." *Id.* at 915 (28a) (emphasis in original). He also found that the distress sale policy was not narrowly tailored as a remedial measure because (1) it was not tied to the effects of past discrimination; (2) the FCC had not considered race-neutral alternatives; and (3) the program imposed an undue burden on Shurberg, which he analogized to being "disqualified from the *only* job currently available in a given community solely because of . . . race." *Id.* at 919 (36a) (emphasis in original).

Judge Silberman accepted with considerable reluctance that the promotion of programming diversity is a sufficiently compelling governmental purpose to support a race-conscious policy, even in the absence of prior discrimination. *Id.* at 920 (39a). But he rejected the nexus found by the FCC, Congress, and the D.C. Circuit's prior decisions between diversity of station ownership and diversity of expression. In particular, he faulted Congress for its failure to make "historical findings of fact," *id.* at 923 (45a), for its omission to present or cite "evidence . . . of a nexus between program diversity and minority ownership," *id.* (46a), and for the absence "of any material developed in congressional hearings." *Id.* at 924 (47a).

Judge MacKinnon concurred in the judgment, but he disagreed pointedly with Judge Silberman's reasoning in important respects. In particular, Judge MacKinnon would not join in Judge Silberman's rejection of Congress' determination that a nexus exists between diversity of station ownership and programming diversity. "Congress is not required to write legal opinions to justify its legislation," Judge MacKinnon said, finding it "difficult to dispute the assertion that Congress found there was a nexus between minority ownership and programming diversity." *Id.* at 932 (64a, 66a).

Judge MacKinnon concluded, however, that the policy was not narrowly tailored to achieve its goals because "there is no actual limitation, in theory or in practice, on the number of licenses that may be so transferred," and because "[c]ompliance is voluntary and the program contains no assurance that any programming diversity will be achieved." *Id.* at 931 (63a) (footnote omitted). Recognizing that only 38 li-

censes were transferred during the first ten years of the policy's operation, Judge MacKinnon faulted the policy because it might result in the transfer of valuable broadcast properties in major markets such as New York, Boston, and Los Angeles. *Id.* at 930 (61a). Judge MacKinnon also found that the policy unduly burdens nonminorities because it forecloses them from obtaining a particular license in the community where they desire to do so, and "will necessarily exclude every nonminority individual in every distress sale." *Id.* at 934 (emphasis in original) (68a).

Chief Judge Wald dissented, describing the distress sale policy as "a unique type of governmental access program not heretofore passed on by the Supreme Court." *Id.* at 934 (70a). She wrote that

[i]n casting off a thoughtfully conceived and monitored program aimed at attaining a legitimate congressionally mandated end, the majority has too rigidly applied Supreme Court affirmative action guidelines designed for other types of programs, ignored firm precedents in this circuit, and failed to credit the explicit intent of Congress.

*Id.* (70a).

Chief Judge Wald disagreed with Judge Silberman's conclusion that Congressional findings of a nexus between ownership and programming could be judicially disregarded. In *Fullilove*, she wrote, this Court "quite clearly rejected the notion that courts may inquire into the sufficiency of congressional deliberations." *Id.* at 940 (82a). Rather, she concluded, "deliberativeness must be presumed so long as Congress had

before it sufficient information for the formation of a considered opinion." *Id.* (82a) (footnote omitted).

Chief Judge Wald concluded that diversity of programming expression is a compelling governmental purpose, that Congress and the FCC had found a nexus between that purpose and diversity of ownership, and that the method chosen by the FCC and endorsed by Congress "clearly meets the test of 'narrow tailoring.'" *Id.* at 947 (97a). In particular, she found no undue burden on nonminorities: "[T]he near-monopoly exercised by nonminorities over broadcast media—they control approximately 98% of all broadcast licenses—and the very limited circumstances in which the distress sale policy can be invoked, suggest that the burden the policy places on nonminority applicants is acceptable." *Id.* at 952 (109a) (footnote omitted).

Both the FCC and Astroline filed timely petitions for rehearing and suggestions for rehearing *en banc*. The FCC's petition said that the majority "erred in holding the distress sale policy unconstitutional" because "the majority did not defer to Congress' judgment that promoting broadcast diversity required limiting use of the distress sale policy to minority buyers in the small numbers of situations each year where the FCC orders a hearing on a broadcast licensee's basic qualifications." FCC Petition for Rehearing and Suggestion for Rehearing *En Banc* 2, 3. The FCC said: "The panel majority . . . has adopted such a low threshold of burden on non-minorities in construing the narrowly tailored standard as to invalidate almost any race conscious programs that a federal agency or Congress could devise." *Id.* at 14.

The suggestions for rehearing *en banc* were denied by a 5-5 vote among the judges in regular active service on the court. Chief Judge Wald dissented from the denial of rehearing *en banc*, joined by Judges Robinson, Mikva, Edwards, and Ruth B. Ginsburg. They joined in Chief Judge Wald's dissent, in which she wrote that "the continued use of the distress sale policy has been mandated by an Act of Congress." 876 F.2d at 958 (157a). She wrote that the panel decision created "substantial doubt" about whether the advancement of diversity could justify *any* race-conscious program, "clearly [calling] into question the constitutionality of affirmative action programs in student admissions at public universities." *Id.* at 959 (159a) (footnote omitted).

#### SUMMARY OF ARGUMENT

I. The FCC's licensing policies—including the distress sale policy—are founded on the First Amendment principle of advancing diversity of expression through the public resource of the broadcast spectrum. Implementation of First Amendment values is a compelling governmental purpose of sufficient gravity to sustain the distress sale policy. This Court has never limited the use of racial distinctions to the remedial context. Here, where the distress sale policy bears Congress' explicit approval, embodied in four separate legislative enactments, such a limitation would be unwarranted. Unlike a policy of a unit of state or local government, the distress sale policy represents an unambiguous exercise of Congress' legislative authority. Moreover, Congress' approval extended not only to the distress sale policy's goal, but to its means as well.

II. The court of appeals erred in finding the distress sale policy not to be narrowly tailored to achieve its concededly compelling goal. The court of appeals adopted such a minimal threshold for undue burden on nonminorities that it is hard to see how any race-conscious policy could survive, especially in the broadcast industry. Moreover, the court of appeals refused to accept Congress' determination, based on an extensive record of fact-finding and decades of oversight in the broadcast industry, that diversifying broadcast station ownership to hitherto excluded minorities can reasonably be expected to result in diversification of programming expression. By sifting the factual basis for Congress' legislative finding, the court of appeals treated Congress as though it were an inferior court or administrative agency, thus raising fundamental separation of powers issues.

#### ARGUMENT

##### I. THE DISTRESS SALE POLICY ADVANCES A COMPELLING GOVERNMENTAL PURPOSE.

Congress has charged the FCC with the regulation of the broadcast industry under the public interest standard of the Communications Act. This Court has repeatedly held that the public interest requires the FCC to give paramount consideration to the audience's First Amendment right to receive as diverse an array of programming expression as the limitations of the broadcast spectrum will accommodate. Over the past 20 years, Congress, the FCC, and the court of appeals have consistently found that the virtual exclusion of minorities from the ownership of broadcast stations impedes the realization of this interest. At the direction of Congress and the court, the FCC has

adopted policies—including the distress sale policy at issue in this case—to advance diversity of expression by eroding the “near-monopoly exercised by nonminorities over broadcast media . . . .” 876 F.2d at 952 (109a) (Wald, C.J., dissenting). All three branches of government have accepted the interest in diversity of broadcast expression as sufficiently compelling to warrant the limited use of race-conscious measures such as the distress sale policy.

**A. Race-conscious policies do not violate the Fifth Amendment if they are narrowly tailored to accomplish a compelling governmental purpose.**

Policies that take race into account survive strict scrutiny under the Fifth Amendment if those policies (1) serve a compelling governmental purpose, and (2) are narrowly tailored to accomplish that purpose. *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980); see also *Regents of the University of California v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J.); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 274 (1986); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721 (1989).<sup>6</sup> Strict scrutiny, however, is not a synonym for unconstitutionality; that scrutiny must not be “strict in theory, but fatal in fact.” *Fullilove*, 448 U.S. at 507 (Powell, J.).

<sup>6</sup> Although the Court has not definitively adopted a single test, we analyze the distress sale policy under strict scrutiny because it satisfies even that exacting standard. “[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach a consensus on the appropriate constitutional analysis.” *United States v. Paradise*, 480 U.S. 149, 166 (1987) (footnote omitted).

Remedying racial discrimination, whether discrimination by the governmental unit involved or pervasive discrimination practiced in a particular industry, constitutes such a compelling purpose, and warrants appropriately tailored policies that make racial or ethnic distinctions. *Fullilove*, 448 U.S. at 477-78; *United States v. Paradise*, 480 U.S. 149, 166 (1987).

Other constitutional interests have also been recognized as important enough to warrant race-conscious governmental policies. In particular, a public university’s interest in assuring racially diverse enrollment presents such an interest. “[T]he right to select those students who will contribute the most to the ‘robust exchange of ideas,’ . . . invokes a countervailing constitutional interest, that of the First Amendment.” *Bakke*, 438 U.S. at 313 (Powell, J.). In *Bakke*, the selection of an ethnically diverse student body was deemed of “paramount importance in the fulfillment of [the university’s] mission” not for its own sake, but because of the diverse array of expression—the “‘robust exchange of ideas’”—that those students would bring to the university. *Id.*

This Court has never held that diversity in a public university’s student body is the only non-remedial interest that is important enough to justify a race-conscious policy.

[C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently ‘important’ or ‘compelling’ to sustain the use of affirmative action policies.

*Wygant*, 476 U.S. at 286 (O'Connor, J.) Individual Justices have suggested several such policies, related to the diversity interest that *Bakke* held could sustain a race-conscious university admissions policy. See *Wygant*, 476 U.S. at 314-16 (Stevens, J., dissenting) (interests in diversity in public school faculty or in integrated police force); *id.* at 288 n.\* (O'Connor, J.) (rejected "role model" goal "should not be confused with the very different goal of promoting racial diversity among the faculty"); *Croson*, 109 S. Ct. at 731 (Stevens, J., concurring).

**B. The First Amendment guides the FCC's exercise of its licensing powers.**

The FCC's broadcast licensing policies must reflect and implement basic First Amendment values.

"[T]he 'public interest' standard necessarily invites reference to First Amendment principles," *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S., at 20.

*FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978).<sup>7</sup> The dominant First Amend-

<sup>7</sup> See also *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) ("the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area"); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) ("the policy of promoting the widest possible dissemination of information from diverse sources [is deemed] consistent with both the public-interest standard and the First Amendment").

ment interest is not the broadcaster's right to speak, but the public's right to receive that expression. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). See also *FCC v. League of Women Voters*, 468 U.S. 364, 377-78 (1984).

In order to discharge its First Amendment responsibilities, the FCC must walk what this Court has described as a "tightrope" between direct content regulation of broadcasting, which would itself jeopardize First Amendment values, and abdication of use of the limited broadcast spectrum to the private discretion of licensees. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 117 (1973). The FCC has therefore pursued a policy of selecting a diverse group of licensees who can "serve in a sense as fiduciaries for the public" (*League of Women Voters*, 468 U.S. at 377) without direct intervention by the FCC. "[I]f the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust." *Id.* at 378.

**C. The FCC's fundamental responsibility to diversify ownership of broadcast stations requires it to address the exclusion of minorities from the broadcast industry.**

In order to recruit broadcasters who will effectively discharge their responsibilities as fiduciaries for the public, the FCC has, for the past quarter-century, made diversity of ownership a central criterion in its

licensing decisions. *National Citizens Committee for Broadcasting*, 436 U.S. at 794-95; *Citizens Communications Center*, 447 F.2d at 1213 n.36 ("The Supreme Court itself has on numerous occasions recognized the distinct connection between diversity of ownership of the mass media and the diversity of ideas and expression required by the First Amendment.") *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) ("Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.") (footnote omitted).

The FCC concluded that it could not effectively pursue a policy of diversifying control of the broadcast media while remaining indifferent to the incontrovertible fact that a large part of the American public—racial and ethnic minorities—were effectively excluded from the ranks of broadcast licensees, to the detriment not only of minority members of the audience but also to the rest of the public who were deprived of the views of minorities on issues of public importance.

The compelling nature of this interest was clear to the D.C. Circuit, which upheld the legitimacy and importance of the FCC's goal in an unbroken series of seven decisions over nearly twenty years<sup>8</sup>—unbroken,

<sup>8</sup> *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972); *TV 9, Inc. v. FCC*, 495 F.2d 929, 937-38 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975); *Loyola University v. FCC*, 670 F.2d 1222, 1225-26 (D.C. Cir. 1982); *West Michigan Broadcasting Co. v. FCC*,

that is, until the decision in this case.<sup>9</sup> The compelling nature of the interest was clear to Congress, which has endorsed the FCC's policies toward that end no fewer than four times in positive legislation.

As this Commission, the courts, and the Congress have recognized, there is a critical underrepresentation of minorities in broadcast ownership, and full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First Amendment.

*Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264 (1982) (footnote omitted), *aff'd*, *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

Thus, unlike the state board of regents' admissions plan struck down in *Bakke*, the county board of ed-

735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *rehearing en banc granted* (Oct. 31, 1985); *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *petition for cert. granted sub nom. Metro Broadcasting Inc. v. FCC*, 58 U.S.L.W. 3427 (U.S. Jan. 8, 1990) (No. 89-453).

<sup>9</sup> Judge Silberman wrote that "[i]t is doubtful that the FCC has a compelling interest in fostering programming diversity" (876 F.2d at 926) (52a). Earlier in his opinion, he acknowledged that "[f]or the time being . . . our precedent compels the conclusion that there is a compelling government interest in increasing diversity of programming." *Id.* at 920 (39a). Judge MacKinnon concurred solely on the issue of narrow tailoring, and therefore did not reach the question of whether a compelling interest existed. *Id.* at 930 n.11 (59-60a).

ucation's teacher layoff plan invalidated in *Wygant*, or the city council's set-aside found unconstitutional in *Croson*, the distress sale policy and the FCC's other minority ownership policies result from the unambiguous assertion of federal authority. Moreover, the authority of Congress—not merely the FCC and the lower courts—stands behind the distress sale policy. As Chief Judge Wald wrote, “[T]he distress sale program is today a deliberately chosen congressional policy, embodied in legislation passed by the House and Senate and signed by the President.” 876 F.2d at 938 (79a). Here, as in *Fullilove*, the Court must “pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President.” 448 U.S. at 473. Though “in no sense does that render it immune from judicial scrutiny,” *id.*, it is “fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.” *Id.* at 483.<sup>10</sup> See also *Columbia Broadcasting System*, 412 U.S. at 102 (“Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission.”)<sup>11</sup>

<sup>10</sup> In *Croson*, the plurality stressed the limited powers of subordinate governmental units compared to the plenary power of Congress: “Justice Powell made it clear [in *Bakke*] that other governmental entities might have to show more than Congress before undertaking race-conscious measures.” 109 S. Ct. at 719. See also *Bakke*, 438 U.S. at 295 n.34 (Powell, J.) (“mere *post hoc* declarations by an isolated state entity” were insufficient predicate for race-conscious program).

<sup>11</sup> Both Congress and the FCC saw the distress sale policy as

D. The court of appeals gave no weight to Congress' approval of the distress sale policy, or the FCC's discretion in administering it.

While deferring—albeit grudgingly—to Congress' determination that diversity of broadcast expression is a *goal* of sufficient gravity to warrant race-conscious measures, the court of appeals rendered no deference to the *means* that Congress selected to achieve that goal: the distress sale policy at issue here. This was an error, for “‘[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power.’” *Fullilove*, 448 U.S. at 480, quoting *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949) (Jackson, J.). Judicial deference to Congress' chosen goals is hollow unless respect is also accorded the means Congress adopts to reach those goals.

In its 1987, 1988, and 1989 appropriations legislation, Congress expressly forbade the FCC to tamper with the distress sale policy, denying the FCC the

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a remedy for prior discrimination, as well as a means of advancing diversity of expression. The Conference Report on the Communications Amendments Act of 1982 stated: “The Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well.” H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43, reprinted in 1982 U.S. Code Cong. & Admin. News 2237, 2287. See also *West Michigan*, 735 F.2d at 616; *Faith Center, Inc.*, 99 F.C.C.2d at 1171. The distress sale policy thus represents not only an exercise of Congress' Commerce Clause authority, but also its equal protection power under Section 5 of the Fourteenth Amendment to remedy prior discrimination.

use of appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to . . . *distress sales* . . . to expand minority and women ownership of broadcasting licenses . . . ." Pub. L. No. 100-202, 101 Stat. 1329 (1987) (emphasis added) (162a). *See also* Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988) (163a); Pub. L. No. 101-162, 103 Stat. 1020-21 (1989) (appendix hereto). To be sure, not even means chosen by Congress are beyond strict scrutiny when they employ distinctions based on race. *Wygant*, 476 U.S. at 280 n.7. That review must take place, however, with an awareness that "[i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress . . . ." *Fullilove*, 448 U.S. at 483, *quoted in Croson*, 109 S. Ct. at 718.

Nor did the court of appeals defer to the FCC's discretion and expertise in determining the policies that would best promote diversity of expression through diversity of ownership. When in the past the court of appeals has intruded too deeply into the FCC's discretion in implementing its diversification policies, this Court has reversed it. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 600 (1981) ("the Commission is . . . vested with broad discretion in determining how much weight should be given to that [diversification] goal and what policies should be pursued in promoting it"); *National Citizens Committee for Broadcasting*, 436 U.S. at 810 ("the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance . . . ."). That discretion does not evap-

orate even where the FCC's choice of policies must be narrowly tailored because they embody racial distinctions.<sup>12</sup>

## II. THE DISTRESS SALE IS NARROWLY TAILORED TO ADVANCE THE COMPELLING INTEREST IN DIVERSITY OF EXPRESSION IN BROADCASTING.

Race-conscious policies must be "narrowly tailored" to the achievement of a compelling governmental interest. *Fullilove*, 448 U.S. at 480; *Bakke*, 438 U.S. at 299; *Wygant*, 476 U.S. at 274. Narrow tailoring is such an elastic standard, however, that it is capable of invalidating most if not all such policies if applied with the utmost stringency on the basis of a reviewing court's hindsight. Here, despite Congressional approval of the distress sale policy, and despite a decade's experience that demonstrated its modest impact on nonminorities, the court of appeals struck the policy down in a manner that would make pursuit of its legitimate goals virtually impossible in the broadcasting industry. Thus applied, the narrow tailoring element of strict scrutiny ensured that the result of the court of appeals' examination in this case would indeed be "strict in theory, but fatal in fact." *Fullilove*, 448 U.S. at 507 (Powell, J.).

The court of appeals held on two bases that the distress sale policy is not narrowly tailored to promote programming diversity: first, that "the program unduly burdens Shurberg, an innocent nonminority," and second, that the policy "is not reasonably related to

<sup>12</sup> "While a remedy must be narrowly tailored, that requirement does not operate to remove all discretion from the District Court in its construction of a remedial decree." *Paradise*, 480 U.S. at 185 (footnote omitted).

the interests it seeks to vindicate." 876 F.2d at 902-03 (2a). Neither ground can withstand scrutiny.

**A. The distress sale policy does not impose unacceptable burdens on nonminority aspirants for broadcast licenses.**

A narrowly tailored program need not "be limited to the least restrictive means of implementation." *Fullilove*, 448 U.S. at 508 (Powell, J.); accord *Paradise*, 480 U.S. at 184. Nor is it a constitutional defect that a program "may disappoint the expectations of nonminority firms." *Fullilove*, 448 U.S. at 484. "As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant*, 476 U.S. at 280-81. But the burden borne by the disappointed applicant here was so light that the court of appeals' decision throws into doubt whether a race-conscious program can constitutionally entail any significant cost to a nonminority firm. As Chief Judge Wald wrote, the court of appeals' opinions suggest "that affirmative action is permissible only when nothing very important is at stake, when such a superabundance of opportunity exists that no one need go without." 876 F.2d at 952 n.47 (109a).

**1. The policy's burden on nonminorities is "relatively light."**

A race-conscious program is narrowly tailored when "[t]he actual 'burden' shouldered by nonminority firms is relatively light . . . ." *Fullilove*, 448 U.S. at 484. During the first ten years of its operation, the distress sale policy resulted in the transfer of 38 broadcast licenses to minority firms. 876 F.2d at 930 (61a). The FCC estimates that it approved a total of approximately 9,000 broadcast license transfers during that

period. FCC Petition for Rehearing and Suggestion for Rehearing *En Banc* 11-12. The distress sale policy thus affected about four-tenths of one per cent of license sales over the course of a decade. By comparison, the set-aside program upheld in *Fullilove* foreclosed nonminority firms from ten per cent of federal public works grants, or about .25 per cent of the annual construction expenditures in the United States. 448 U.S. at 484 n.72.

The two judges who made up the court of appeals majority avoided the obvious parallels with *Fullilove* by defining the opportunity to compete for a *single* station in a *single* locality as unique. 876 F.2d at 918 (Silberman, J.) (35a); *id.* at 933-34 (MacKinnon, J.) (68a). Judge Silberman adopted this exceedingly narrow focus because "[i]t is a Hartford station Shurberg wants," analagous in his view to "disqualifi[cation] from the *only* job currently available in a given community . . . ." *Id.* at 918, 918 (35a, 36a) (first emphasis added; second original). If that were the rule, the loss of any economic opportunity would be an unconstitutional burden if the nonminority could show that he wanted it badly enough. In *Fullilove*, the Court measured the extent of foreclosure on a national scale; here, the court of appeals limited itself to a universe of one license in one city.<sup>13</sup>

The broadcast industry was not closed to Shurberg, either in Hartford or elsewhere. Shurberg could still compete for, or seek to buy, broadcast licenses in

<sup>13</sup> Compare *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 173 (6th Cir. 1983) (foreclosure of nonminorities' opportunity must be measured by all contracts in state, not merely by contracts let directly by state government).

Hartford or in other markets.<sup>14</sup> "As in *Fullilove*, non-minority firms remain free to compete for the vast majority of licensee opportunities available." 876 F.2d at 951 (Wald, C.J., dissenting) (106a).

Alternatives to the distress sale policy for advancing minority ownership would entail far heavier burdens for innocent nonminorities. Incumbent licensees who have provided adequate or better service to the public receive a renewal expectancy that gives them an advantage in license renewal proceedings. *National Citizens Committee for Broadcasting*, 436 U.S. at 805; *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 506-7 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). Instances in which the incumbent licensee forfeits that expectancy (like Faith Center here), or in which a license is vacant, may well be relatively

<sup>14</sup> Judge Silberman considerably overstated Shurberg's competitive disadvantage as an applicant in a comparative hearing for a license anywhere but in Hartford. 876 F.2d at 918 (35a). Local residency comes into play only when applicants are evenly matched on "quantitative" grounds, i.e., integration of ownership with full-time management of the station. A clearly superior proposal on quantitative grounds carries the day and cannot be overcome by "qualitative" enhancements such as local residency. *High Sierra Broadcasting, Inc.*, 96 F.C.C.2d 423, 432 (Rev. Bd. 1983). In addition, an applicant who plans to move to the community of service receives some credit for proposed local residency, and that factor, combined with a quantitatively superior proposal, can overcome the enhancement for existing local residency. *Id.*

Moreover, an applicant with no other media interests gains a considerable advantage on diversity grounds. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395 (1965). If Shurberg has no other media interests, and proposes to participate fully as an owner-manager, place of residence occupies a secondary role in any comparative analysis.

unusual. But it is precisely in those instances where the FCC's minority ownership policies can have an impact without displacing an otherwise meritorious incumbent licensee. To oust an unoffending incumbent licensee to make room for a minority candidate would be a far heavier burden on innocent nonminorities. Compare *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) ("The plan does not require the discharge of white workers and their replacement with new black hirees"). If the burden on Shurberg is unacceptable—the loss of one opportunity for one aspiring broadcaster to compete for a license in his hometown—it is hard to see how any policy for increasing minority ownership could function constitutionally in the broadcast industry.

By contrast, the potential vacancy on which the distress sale policy operates is not created for race-related reasons, but rather by the incumbent's own failings or misconduct that have put its license at risk. Unlike the innocent nonminority teachers in *Wygant*, who stood to lose their jobs solely so that minority teachers would not have to lose theirs, the departing licensee in a distress sale has created its own predicament—and still cannot be compelled to relinquish its license to a minority buyer if it chooses to stand and fight.

## 2. The distress sale policy disrupts no "settled expectations."

Any burden on nonminorities imposed by a race-conscious policy is magnified if it consists of the loss of an existing means of livelihood, or a similarly "intrusive" detriment that "disrupt[s] . . . settled expectations" of innocent nonminorities. *Wygant*, 476 U.S. at 283. Ordinarily, layoffs cannot qualify as narrowly

tailored remedial measures because they "impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Id.* Hiring or promotion goals, on the other hand, usually involve an acceptable burden, because they "often foreclos[e] only one of several opportunities" and the burden "is diffused to a considerable extent among society generally." *Id.* at 282, 283.<sup>15</sup>

It is difficult, if not impossible, to discern an injury to Shurberg Broadcasting or to its sole owner comparable to the loss of a job. The distress sale to Astroline had no effect on Shurberg's existing activity whatsoever. Its only burden was the loss (or deferral) of one opportunity to enter a new field at a particular place and time and in a particular manner: as sole owner of a broadcast station in Hartford in 1985. As Chief Judge Wald pointed out, "Shurberg has been rendered no worse off than it was before Faith Center's fortuitous misconduct[.]" 876 F.2d at 952 (108a).

Moreover, what Shurberg lost was not the license to broadcast over Channel 18, but merely the chance to vie in a comparative hearing with Faith Center, Astroline, and any other aspirants who might also wish to compete for that license. As Chief Judge Wald noted, a nonminority applicant who wishes to seek a license through the vagaries of a comparative hearing "certainly lacks the legitimate expectation of contin-

<sup>15</sup> Delay in promotion opportunities, for example, usually do not pose unacceptable burdens. *Howard v. McLucas*, 871 F.2d 1000, 1009 (11th Cir. 1989); *Higgins v. City of Vallejo*, 823 F.2d 351, 359-60 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 1310 (1989); *Youngblood v. Dalzell*, 804 F.2d 360, 365 (6th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987).

ued employment of someone already working." 876 F.2d at 951 (107a). Opportunities to compete can be valuable, to be sure, but they simply cannot compare with the loss of a job (or a license) on which its holder may have depended for much of his or her working life. *Compare Paradise*, 480 U.S. at 189 (Powell, J.) ("uncertain" whether or when nonminority state troopers would have been promoted absent race-conscious remedy) with *Bakke*, 438 U.S. at 320-21 n.54 (Powell, J.) (reservation of block of medical school places resulted in plaintiff's exclusion; there was "no question as to the sole reason for respondent's rejection. . .").<sup>16</sup>

Finally, the court of appeals' analysis overlooks the essential public interest element of FCC licensing decisions. The FCC does not merely allocate economic opportunities among entrepreneurs; it selects persons who will serve as "fiduciaries for the public" (*League of Women Voters*, 468 U.S. at 377) and grants them the revocable right to use the public resource of the broadcast spectrum. Applicants simply cannot claim

<sup>16</sup> See also *Johnson v. Transportation Agency, Santa Clara County, Calif.*, 480 U.S. 616, 638 (1987):

[P]etitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner.

By contrast, Shurberg, at the time it sought comparative consideration for Channel 18, had not been called upon to demonstrate its qualifications as a licensee. Not only were its prospects in a comparative hearing conjectural, but its basic qualifications remained to be established.

a settled expectation to obtain a broadcast license free of public interest considerations.

[I]n the allocation of broadcast licenses, there is no vested right or even a reasonable expectation of a right to own a station. Rather, there is only the public interest in the use of public airwaves.

Hilliard, *Constitutional Conflict over Race and Gender Preferences in Commercial Radio and Television Licensing*, 38 Kan. L. Rev. 343, 373 (1990).

**3. The distress sale program does not allocate fixed percentages or numbers of opportunities.**

A narrowly tailored policy ordinarily should avoid a race-based allocation of benefits according to a fixed, unyielding percentage or quota. See *Fullilove*, 448 U.S. at 473 (no "inflexible percentages solely based on race or ethnicity") (emphasis added); *Bakke*, 438 U.S. at 316 ("assignment of a *fixed number* of places to a minority group") (emphasis added); *Croson*, 109 S. Ct. at 728 (constitutionally infirm plan relied on "a *rigid numerical quota*" which "cannot be said to be narrowly tailored to any goal") (emphasis added).

The distress sale policy constitutes no such set-aside. Distress sale opportunities arise unpredictably, depending on the number of licensees whose basic qualifications are called into question, and who are willing to sell to a minority buyer. The FCC did not reserve for minority owners the 38 licenses actually transferred under the policy between 1978 and 1988. Rather, as Judge MacKinnon wrote, that number was "wholly fortuitous, being dependent upon decisions by third party licensees whose practices run afoul of FCC requirements." 876 F.2d at 931 (62a). Only those licensees who opt for a distress sale, and who find a

willing buyer, actually transfer their licenses by that route; licensees who elect to contest their hearings, or who fail to find a buyer, are unaffected. Even if the FCC were cynically disposed to designate licenses for hearing simply to create more distress sale opportunities, it still could not force any licensee to transfer its license to a minority buyer. As Chief Judge Wald wrote, "Because of the unique and unpredictable nature of such situations, a distress sale can hardly be said to disrupt the settled expectations of potential licensees." 876 F.2d at 951 (107a).

More than a decade's experience with the policy dispels any reasonable fear that the policy could result in the reservation of a large portion of the broadcast industry for particular racial or ethnic groups. Distress sales have taken place at an average of fewer than four per year over a ten-year period. Judge MacKinnon's apprehension that the policy lacks any ceiling on the number of licenses that can be transferred (876 F.2d at 930, 931) (61a, 63a) might be cause for concern if there were no experience with the policy; in light of the policy's track record of modest success, it is no longer reasonable to harbor such doubts. The policy's lack of a specific ending date, or of a particular target of minority representation in the industry, is thus not a constitutional defect.

It is . . . unsurprising that the Plan contains no explicit end date, for the Agency's flexible, case-by-case approach was not expected to yield success in a brief period of time. Express assurance that a program is only temporary may be necessary only if the program actually sets aside positions according to specific numbers.

*Johnson v. Transportation Agency, Santa Clara County, Calif.*, 480 U.S. 616, 639-40 (1987). In this respect, of course, the distress sale program is *less* exclusionary than the program upheld in *Fullilove*, which reserved 10 per cent of construction funds for minority contractors, subject only to the flexibility provided by an administrative waiver system. By contrast, the distress sale policy has no minimum targets at all.

Judge MacKinnon found the distress sale policy constitutionally wanting despite its concededly "fractional" impact on the universe of broadcast licenses because the policy "will necessarily exclude *every* non-minority individual in *every* distress sale." 876 F.2d at 934 (68a) (emphasis in original). The policy is of course intended to increase the number of minority broadcasters; the fact that it actually does so in the small number of cases in which it is invoked cannot, standing alone, condemn it.

But Judge MacKinnon overstates the impact of the distress sale policy, even where it comes into play: nonminority rivals are *not* "necessarily exclude[d]" by a licensee's attempt to effect a distress sale. A non-minority applicant wishing to compete for the license can oppose the incumbent's application for approval of a distress sale. That is exactly what Shurberg did here, with partial success: the FCC ruled that if the sale to Astroline was not completed, no more distress sales would be authorized, and Channel 18 would be thrown open for competing applications from Shurberg and any other party that chose to file. *Faith Center, Inc.*, 99 F.C.C.2d at 1170 (122a). The FCC denied distress sale treatment for two other Faith Center stations, opening the way for nonminority

firms to file competing applications. *Faith Center, Inc.*, 82 F.C.C.2d 1 (1980), *recons. denied*, 86 F.C.C.2d 891 (1981); *see* 876 F.2d at 951 & n.41 (106a) (Wald, C.J., dissenting).

Moreover, the FCC does not permit a licensee facing a competing application before its case is designated for hearing to elect a distress sale. "Distress sales are an option only where no competing applicant is involved in the hearing. In comparative hearings the Ashbacker rights of the challenger to a full administrative comparison with the incumbent properly preclude departure of the existing licensee from the administrative process." *Clarification of Distress Sale Policy*, 44 Rad. Reg. 2d (P & F) 479, 480 n.3 (1978). And subsequent to a distress sale, the new licensee must face renewal proceedings, and the possibility of competing applications, just as any other licensee would.<sup>17</sup> Thus, even as to the license at issue, non-minorities retain the opportunity to compete before, during, *and* after the effectuation of a distress sale.

#### 4. The FCC attempted race-neutral alternatives, to no avail.

A narrowly tailored policy should reflect attempts to reach the same goal by race-neutral means. *Wygant*, 476 U.S. at 280 n.6; *Croson*, 109 S. Ct. at 728. Those race-neutral means, however, must have a reasonable prospect of success in a foreseeable period of

<sup>17</sup> Here, no party—including Shurberg—filed a competing application in the renewal "window" preceding the designation of Faith Center's license for hearing. Four other applicants—but not Shurberg—filed competing applications against Astroline in the renewal "window" period following sale of the station. FCC Petition for Rehearing and Suggestion for Rehearing *En Banc* at 13 n.19.

time; they are genuine alternatives only if they "promote the substantial interest about as well and at tolerable administrative expense." Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Colum. L. Rev. 559, 578-79 (1975), quoted in *Wygant*, 476 U.S. at 280 n.6.

Here, it is beyond dispute that the FCC tried race-neutral remedies before adopting the distress sale policy: it promulgated and enforced equal employment opportunity rules, and it required licensees to meet with leaders of the minority community to ascertain community programming needs. 68 F.C.C.2d at 979-81 (130-132a). The FCC created the distress sale policy only after it expressly found that those alternatives were unsuccessful. *Id.* at 980 (133a). As Chief Judge Wald noted, "The Commission's general pursuit of diversified broadcasting has failed miserably in achieving meaningful minority representation." 876 F.2d at 949 (103a). Compare *Croson*, 109 S. Ct. at 728 ("there does not appear to have been any consideration of the use of race-neutral means") (emphasis added).

Judge Silberman suggested, in a single sentence, that the FCC should instead have adopted unspecified measures to publicize the availability of stations for sale, or to assist prospective purchasers with financing. 876 F.2d at 917 (32a). He did not explain how these measures could reasonably be expected to result in tangible results in the foreseeable future. The FCC cannot be required to exhaust every imaginable alternative that may occur to a reviewing court, regardless of the delay or the drain on its resources.

A judge would be unimaginative indeed if he could not come up with something a little less "drastic"

or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down.

*Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring). Like a district court, the FCC has substantial advantages in determining what means will be effective, stemming from its knowledge of the industry and first-hand experience with the problem. "[The district court's] proximate position and broad equitable powers mandate substantial respect for this judgment." *Paradise*, 480 U.S. at 184.

Moreover, the obvious race-neutral alternative—fostering program diversity by direct regulation of program content—is foreclosed by the First Amendment, as the FCC properly noted when it originally promulgated the distress sale policy. 68 F.C.C.2d at 981 (134a). "[D]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'" *National Citizens Committee for Broadcasting*, 436 U.S. at 796-97. See also *Columbia Broadcasting System*, 412 U.S. at 126 (avoidance of "enlargement of Government control over the content of broadcast discussion of public issues" is "problem of critical importance to broadcast regulation and the First Amendment").

##### 5. Each distress sale receives the FCC's scrutiny.

Another hallmark of a narrowly tailored policy is the inclusion of an administrative mechanism that offers "reasonable assurance" that the policy's purposes will be accomplished and "that misapplications of the

program will be promptly and adequately remedied administratively." *Fullilove*, 448 U.S. at 487. Such a mechanism indisputably exists here: *every* distress sale application requires the FCC's individualized approval. Objectors such as Shurberg can be heard on whatever issues they wish to raise.<sup>18</sup>

The FCC is alert, for example, to ferret out distress sale purchasers who are merely minority "fronts." *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 855 (1982); see *Fullilove*, 448 U.S. at 487-88 ("There is administrative scrutiny to identify and eliminate from participation in the program [minority business enterprises] who are not 'bona fide' . . . spurious minority-front entities can be exposed."). Shurberg could and did raise such an objection before the FCC (which found that it had no merit). 99 F.C.C.2d at 1170-72 (124-26a).<sup>19</sup>

The court of appeals ignored the FCC's individualized consideration of each distress sale application, though Judge Silberman faulted the FCC for not

<sup>18</sup> "Administrative procedures will be adequate if the decision-making body has the opportunity to consider the appropriateness of awarding each contract on the basis of race-conscious preferences." *Associated Gen. Contractors of California, Inc. v. City & County of San Francisco*, 813 F.2d 922, 937 n.30 (9th Cir. 1987).

<sup>19</sup> The FCC has been vigilant to police abuses of the distress sale policy. When the owners of two radio stations engaged in a sham distress sale that resulted in the unauthorized transfer of the stations back to one of their original owners, the Review Board invoked the FCC's ultimate sanction: it revoked both licenses for abuse of the distress sale policy. *Silver Star Communications-Albany, Inc.*, 3 F.C.C. Rcd. 6342 (Rev. Bd. 1988).

requiring each purchaser to demonstrate that he or she had suffered victimization or disadvantage from discrimination. 876 F.2d at 916 (31a).<sup>20</sup> This is beside the point, however, for the principal goal of the distress sale policy is to promote diversity of expression, not to remedy prior discrimination. As Chief Judge Wald wrote, "Any requirement that affirmative action plans bestow their benefits only on those who are themselves victims is therefore inapplicable to Congress' justification for the distress sale policy." 876 F.2d at 947 (97a).

**B. The distress sale policy is reasonably related to its goals.**

The court of appeals' second basis for finding that the distress sale policy lacks narrow tailoring was that it "is not reasonably related to the interests it seeks to vindicate," 876 F.2d at 902-03 (2a), in that no adequate basis assertedly exists to believe that increasing minority ownership will increase diversity of programming expression. Not only does this assertion conflict with the considered judgment of the FCC and several earlier decisions of the court of appeals, but it also contradicts the express findings of Congress that a nexus between diversity of ownership and diversity of expression indeed exists. If sustained, this ground would represent an extraordinary judicial incursion into Congress' legislative factfinding authority.<sup>21</sup>

<sup>20</sup> Each distress sale purchaser is, however, required to demonstrate its qualifications as a broadcast licensee, as *Astroline* did in this case. 99 F.C.C.2d at 1170 (122a). See *Paradise*, 480 U.S. at 189 ("only qualified minority applicants are eligible for promotion") (Powell, J.).

<sup>21</sup> As an initial matter, it should be noted that even though

Judge Silberman acknowledged that the legislative history of the Communications Amendments Act of 1982 contains an express finding that diversity of ownership—and the inclusion of previously excluded minorities among the ranks of station owners—leads to diversity of programming. “The nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the Commission and the courts.” H. R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2237, 2284. But he rejected that finding because Congress did not make what he described as “historical findings of fact,” did not refer “to evidence upon which the committee drew,” and lacked “the support of any material developed in congressional hearings . . . .” 876 F.2d at 923-24 (45-47a).

This was incorrect both legally and factually. Judge Silberman’s refusal to accept Congress’ determination

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this rationale appears in the one-paragraph *per curiam* order, there is reason to believe that it represents solely Judge Silberman’s view. Judge MacKinnon, concurring on the ground of burden on innocent nonminorities, wrote that “[t]he Silberman opinion also contends that the distress sale program, as a means of promoting diversity, is not a means that is reasonably related to its goal.” 876 F.2d at 931-32 (64a). Judge MacKinnon pointedly dissassociated himself from this view, noting that “it is difficult to dispute the assertion that Congress found there was a nexus between minority ownership and programming diversity.” *Id.* at 932 (66a). Though his personal view might differ, Judge MacKinnon wrote, “the congressional finding controls.” *Id.* at 932 n.21 (65a). Thus, while Judge MacKinnon agreed with Judge Silberman that the distress sale policy was not reasonably related to the eradication of prior discrimination (*id.* at 931) (62-63a), he clearly did *not* agree that the policy was not reasonably related to diversification of broadcast expression.

runs squarely counter to *Fullilove*’s holding that “Congress, of course, may legislate without compiling the kind of ‘record’ appropriate with respect to judicial or administrative proceedings.” 448 U.S. at 478. This Court has cautioned against the separation of powers difficulties that would attend a judicial reexamination of the factual record on which Congress bases its legislative judgments and findings. “[W]e must be particularly careful not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.” *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981); *see also id.* at 82-83: “The District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of Congress’ evaluation of that evidence.” (emphasis in original)<sup>22</sup>

Moreover, a legislative record existed for the 1982 legislation, though Judge Silberman failed to acknowledge it. The committee cited directly to the FCC’s 1978 Taskforce *Report on Minority Ownership in Broadcasting*, and to the FCC’s 1978 *Policy Statement* that announced the creation of both the distress sale and tax certificate policies. The 1978 *Policy Statement* in turn relied on the *Report of the National Advisory Commission on Civil Disorders* (U.S. Gov’t Printing

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<sup>22</sup> *See also National Treasury Employees Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984) (“Such an intrusion into Congress’ legislative deliberations would pose serious separation-of-powers problems, and neither the language nor logic of the Constitution compels such an inquiry.”). Chief Judge Wald wrote in her dissent: “Given this factual background, my colleague’s refusal to regard the statute as a considered congressional choice is simply judicial presumptiveness.” 876 F.2d at 940 (83a).

Ofc. 1968) (the "Kerner Report") and on U.S. Commission on Civil Rights, *Window Dressing on the Set* (U.S. Gov't Printing Ofc. 1977). All three documents, each based on extensive factual investigation, documented the exclusion of minorities from positions of responsibility in the media, and the media's consequent failure to present minority viewpoints.<sup>23</sup> Before Congress adopted the 1987, 1988, and 1989 appropriations acts that prohibited abandonment of the distress sale policy, extensive hearings were held that delved into minority underrepresentation in the broadcast industry and its adverse effect on programming

<sup>23</sup> The Kerner Report devoted a chapter to media coverage of civil disorders, concluding that the inadequacies of that coverage were a symptom of the underrepresentation of blacks in journalistic positions of responsibility. *Kerner Report* at 201-13. "The journalistic profession has been shockingly backward in seeking out, hiring, training, and promoting Negroes. . . . [V]ery few Negroes in this country are involved in making [editorial] decisions, because very few, if any, supervisory editorial jobs are held by Negroes." *Id.* at 211.

The Civil Rights Commission Report examined at great length the portrayals of minorities in the U.S. television industry, the inadequacies of which the Commission attributed to "the extent to which minorities and women—particularly minority women of each of the groups studied—continue to be underrepresented on local station work forces and to be almost totally excluded from decisionmaking and important professional positions at those stations." *Window Dressing on the Set* at 3.

It should be noted that part of the "abundant historical basis" (448 U.S. at 478) that supported Congress' creation of the set-aside program in *Fullilove* was—as here—a Civil Rights Commission report on the barriers encountered by minorities in gaining government contracts. 448 U.S. at 466-67.

diversity.<sup>24</sup> An extensive factual record thus existed, and Congress expressly relied on it.

Judge Silberman criticized the Conference Report's findings (and the FCC's conclusions on which it relied) as "in the nature of *predictions* as to future behavior," rather than conclusions drawn from a factual record. 876 F.2d at 923 (emphasis in original) (45a). But this Court has repeatedly held that the FCC's judgments as to how best to promote diversity in broadcasting are (and must be) predictive. "[T]he Commission's decisions must sometimes rest on *judgment and prediction* rather than pure factual determinations." *WNCN Listeners Guild*, 450 U.S. at 594 (emphasis added). "[C]omplete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *National Citizens Committee for Broadcasting*, 436 U.S. at 814, quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

Moreover, the proposition that minority ownership would encourage diversity of programming and pres-

<sup>24</sup> *Parity for Minorities in the Media—Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 1, 3, 125, 135, 147-49, 159-67, 194 (1983); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 1, 4, 7-8, 138, 161 (1983); *Minority-Owned Broadcast Stations—Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 1, 2, 51, 56-57, 89 (1986).

entation of fresh viewpoints has seemed so reasonable as hardly to require proof.

[I]t is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news. . . . Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors.

*TV 9, Inc.*, 495 F.2d at 938 (footnote omitted). See also *West Michigan*, 735 F.2d at 610. A nexus between minority employment and programming expression seemed reasonable to this Court, when it stated that the FCC's equal employment regulations "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976) (*dictum*).

Finally, Justice Powell's pivotal opinion in *Bakke*, confirming the ability of a university to take race into account in assembling a diverse student body, required neither evidence nor findings to establish the nexus between diversity and educational quality. Rather, he wrote, educational excellence is "*widely believed to be promoted by a diverse student body[,]*" 438 U.S. at 312 (emphasis added), citing only an article by a university president who said that "[i]n the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs." *Id.* at 313 n.48. Belief in the con-

tribution of diversity to education rested not on evidence or findings, Justice Powell said, but on "our tradition and experience." *Id.* at 313.

In short, Judge Silberman invaded the province of Congress when he held that the distress sale program lacked a reasonable relation to its ends. The nexus between minority ownership and programming diversity rests on Congressional findings, supported by evidence, and on the expert judgment of the Commission, confirmed repeatedly by reviewing courts.<sup>25</sup> Evidentiary review of Congress' legislative factfinding is neither warranted nor constitutionally appropriate.

<sup>25</sup> Unlike the construction industry in *Fullilove*, the broadcast industry is subject to direct, ongoing congressional supervision. For the past fifty years, Congress has compiled a record that supports the conclusion that there is a nexus between program diversity and minority/female ownership of broadcast stations.

Hilliard, *supra* p. 36, at 372.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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February 9, 1990

## **APPENDIX**

**APPENDIX**

**DEPARTMENTS OF COMMERCE, JUSTICE, AND  
STATE,  
THE JUDICIARY, AND RELATED AGENCIES  
APPROPRIATIONS ACT, 1990**

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**FEDERAL COMMUNICATIONS COMMISSION  
SALARIES AND EXPENSES**

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\* \* \* *Provided*, That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in the Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended 52 R.R.2d 1313 (1982) and Mid-Florida Television Corp., 60 F.C.C.2d 607 Rev. Bd. (1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending conclusion of the inquiry: \* \* \*

No. 89-700

Supreme Court U.S.

FILED

FEB 9 1990

U.S. DEPT. OF JUSTICE

CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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ASTROLINE COMMUNICATIONS CO.,  
LIMITED PARTNERSHIP, PETITIONER

v.

SHURBERG BROADCASTING OF HARTFORD, INC., ET AL.

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION**

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### **QUESTION PRESENTED**

Whether the Federal Communications Commission's minority distress sale policy, which permits a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms, violates the equal protection component of the fifth amendment.

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# In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-700

ASTROLINE COMMUNICATIONS CO.,  
LIMITED PARTNERSHIP, PETITIONER

v.

SHURBERG BROADCASTING OF HARTFORD, INC., ET AL.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-112a) is reported at 876 F.2d 902. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 113a-129a) is reported at 99 F.C.C.2d 1164 (1984).

## JURISDICTION

The judgment of the court of appeals (Pet. App. 141a) was entered on March 31, 1989. The orders of the court of appeals denying rehearing and rehearing *en banc* (Pet. App. 143a, 155a) were entered on June 16, 1989. The petition for a writ of certiorari was filed on October 30, 1989. The petition was granted on January 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

Relevant portions of the Constitution of the United States, the Communications Act of 1934, as amended, 47 U.S.C. 151 *et seq.*, and other statutes are set forth at Pet. App. 161a-164a.

## STATEMENT

### A. Background

#### 1. Development of FCC Minority Ownership Policies

##### a. *Early Recognition of the Need for Specific Minority Policies*

This case involves the FCC's minority distress sale policy, which provides incentives for existing licensees, in narrowly defined circumstances, to sell a radio or television station to a minority controlled buyer. This policy, adopted by the FCC in 1978, is one aspect of the agency's more general, and longstanding, efforts to increase diversity in radio and television programming generally by increasing diversity of ownership of broadcast stations.<sup>1</sup> The Commission has explained that it has been committed to the concept of diversity of control of broadcast stations because "diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965).

In the late 1960s, following the adoption of the Civil Rights Act of 1964 and the *Report of the National Advisory Commission on Civil Disorders* (1968) [hereafter *Kerner Comm'n Report*], the Commission began to focus its diversity-related concerns on the very small participation by minorities in the broadcasting industry. The Commission acted first in the area of employment by adopting regulations that sought to ensure that broadcast licensees did not discriminate against minorities in their employment practices. See, e.g., *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969).<sup>2</sup>

<sup>1</sup> See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *Storer Broadcasting Co. v. United States*, 220 F.2d 204, 209 (D.C.Cir. 1955), rev'd on other grounds, 351 U.S. 192 (1956); *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965).

<sup>2</sup> See also *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970); *Nondiscrimination in the Employment Policies and*

The Commission stated that "broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license." *Non-discrimination Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766, 769 (1968). This Court observed in 1976 that FCC regulations dealing with employment practices "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FCC*, 425 U.S. 662, 670 n.7 (1976).

The Commission also sought to enhance broadcast program diversity by requiring station owners to "ascertain" the needs, interests and problems of substantial segments of their communities, specifically including "minority and ethnic groups" and to direct their non-entertainment programming to those ascertained needs. See *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418, 419, 442 (1976).

The FCC's initial steps to improve minority participation in broadcasting did not involve the consideration of race as a factor in licensing decisions. In fact, in 1972 the FCC rejected a claim "that Black ownership of a television station is, by itself, in the public interest because only then will the station be truly responsive to the needs of the . . . Black community." *Mid-Florida Television Corp.*, 33 F.C.C.2d 1, 17 (Rev. Bd.), rev. denied, 37 F.C.C.2d 559 (1972), rev'd *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C.Cir. 1973), cert. denied, 419 U.S. 986 (1974). The Commission refused to give credit to an applicant in a comparative licensing proceeding solely on account of the race of its owners, where the record did not give assurance that the owner's race would be likely to affect the quality of the station's broadcast service to the public. The Commission held that under the governing statutory standard for licensing — "the public interest,

*Practices of Broadcast Licensees*, 54 F.C.C.2d 354 (1975); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976).

convenience, and necessity" (47 U.S.C. 309(a))—licensing determinations depend upon service to the public, not upon the racial makeup of an applicant's stockholders. "Black ownership cannot and should not be an independent comparative factor . . . ; rather, such ownership must be shown on the record to result in some public interest benefit." 33 F.C.C.2d at 18.

The court of appeals, however, rejected the Commission's position that the circumstances must give an "advance assurance of superior community service attributable to such Black ownership and participation. . . ." *TV 9, Inc. v. FCC*, 495 F.2d at 938. "Reasonable expectation," the court held, "not advance demonstration, is a basis for merit to be accorded relevant factors." *Ibid.* The court explained:

It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship. . . . We hold only that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded.

*Id.* at 937-938.

Two years later the court emphasized that "[t]he entire thrust of *TV 9, Inc.* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that 'reasonable expectation' without 'advance demonstration,' gives them relevance." *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C.Cir. 1975) (footnotes omitted). See also *West Michigan Broadcasting Corp. v. FCC*, 735 F.2d 601, 610-611 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985).

Following the decisions of the court of appeals in *TV 9, Inc.* and *Garrett*, the Commission modified its policy with respect to the consideration of merit for minority ownership in the context of comparative licensing proceedings. The Commission an-

nounced that minority ownership, where the minority owners would participate in the day-to-day operation of the proposed station, would be considered a "plus factor" in determining which among competing license applications to grant. See *WPIX, Inc.*, 68 F.C.C.2d 381, 411-412 (1978). This "plus factor" subsequently was extended to applicants that proposed to include female owners who would be involved in the station's operations. See *Mid-Florida Television Corp.*, 69 F.C.C.2d 607, 652 (Rev.Bd. 1978), set aside on other grounds, 87 F.C.C.2d 203 (1981); *Horne Industries*, 94 F.C.C.2d 815, 822-24 (Rev.Bd. 1983), review denied, 56 Radio Reg.2d (P&F) 665, 668 (1984).

#### b. *The Distress Sale Policy*

In 1978 a task force formed by the FCC to examine the issue of minority ownership of radio and television broadcast stations issued a report finding that "the minority community continues to be underrepresented among broadcast station owners" and that this situation was "a direct result" of past society-wide discrimination. FCC Minority Ownership Task Force, *Minority Ownership in Broadcasting Summary* at 1, 7 (1978) [hereafter *Minority Task Force Report*]. The task force found that significant barriers, including lack of information, lack of adequate financing and inexperience in the industry, had hampered the growth of minority ownership. *Id.* at 8-29. The task force recommended that further steps should be taken by the FCC to encourage and facilitate the entry of more minorities into ownership of broadcast stations. *Id.* at 1, 8, 30.

The FCC reviewed the findings of the *Minority Task Force Report* and concluded that there was a need for further action to address the "[a]cute underrepresentation of minorities among the owners of broadcast properties. . . ." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978) [hereafter *1978 Minority Policy Statement*] (Pet. App. 130a), quoting *Minority Task Force Report* at 1. The Commission found that its initial steps involving employment and ascertainment had not been sufficient. The Commis-

sion noted, referring to the findings of the task force, that fewer than one per cent of the 8500 commercial radio and television stations operating in 1978 were controlled by minorities, although minorities constituted 20 percent of the population. See *1978 Minority Policy Statement*, 68 F.C.C.2d at 981, citing *Minority Task Force Report* at 1 (Pet. App. 133a-34a).<sup>3</sup> The Commission found that although "the broadcasting industry has on the whole responded positively" to previous FCC initiatives, "the views of racial minorities continue to be inadequately represented in the broadcast media." *1978 Minority Policy Statement*, 68 F.C.C.2d at 980 (footnotes omitted) (Pet. App. 132a-133a).

Concluding that "additional measures are necessary and appropriate," *1978 Minority Policy Statement*, 68 F.C.C.2d at 981 (Pet. App. 133a), the Commission responded by adopting the distress sale policy, along with another policy involving tax certificates, in an effort to address the problems illuminated by the task force report. The minority distress sale policy was based on the Commission's belief that "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming . . ." and that "[a]dequate representation of minority viewpoints in programming . . . enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the

<sup>3</sup> See also United States Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* 280 (1971) ("[O]f the approximate[ly] 7,500 radio stations throughout the country, only 10 are owned by minorities. Of the more than 1,000 television stations, none is owned by minorities."), cited in *TV 9, Inc.*, 495 F.2d at 937 n.28; *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (1971) ("According to the uncontested testimony of petitioners, no more than a dozen of [the] 7,500 broadcast licenses issued are owned by racial minorities."); *Mid-Florida Television Corp.*, 37 F.C.C.2d at 563 (Commissioner Hooks, concurring) ("While there is still no black ownership of a television station, I am told that black ownership of radio stations may be approaching the astronomical figure of 20 out of nearly 7,000."); United States Commission on Civil Rights, *Federal Civil Rights, Federal Civil Rights Enforcement Effort—1974* at 49 (1974) ("In 1973, there were over 7,000 radio stations and 1,000 television stations operating in the United States. Of these, only 33 radio stations located in 20 states and the District of Columbia and no television stations were owned by minority group members.").

First Amendment." *Id.* at 981 (Pet. App. 134a, 133a). Lack of minority representation among owners of broadcast stations, the Commission held, "is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience." *Ibid.*

Accordingly, "in order to further encourage broadcasters to seek out minority purchasers," the distress sale policy

permit[s] licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualifications issues . . . to transfer or assign their licenses at a "distress sale" price to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets other qualifications.

*Id.* at 983 (footnote omitted) (Pet. App. 138a). Ordinarily, FCC policy has precluded licensees whose licenses have been designated for revocation hearing or whose renewal applications have been designated for hearing on basic qualifications issues from selling the station and license until questions about their qualifications have been resolved favorably. See *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1027 (D.C.Cir. 1981); *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C.Cir. 1964); *Bartell Broadcasting of Florida, Inc.*, 45 Radio Reg.2d (P&F) 1329, 1331 (1979). The distress sale program is an exception to that generally applicable policy. It provides a broadcast licensee that is in danger of losing its license with an incentive to transfer its interest to a minority controlled entity in order to recoup part of its investment rather than risk losing virtually everything if its license is revoked or renewal denied.<sup>4</sup> The distress sale policy

<sup>4</sup> Two categories of exceptions had existed to the FCC's general prohibition against the sale of a station while the propriety of a licensee's operation of that station was in serious question: (1) where the licensee was seriously ill or disabled (see *Cathryn Murphy*, 42 F.C.C.2d 346 (1973)); and (2) where the licensee corporation was bankrupt and was effecting a sale for the benefit of innocent creditors (see *La Rose v. FCC*, 494 F.2d 1145 (D.C.Cir. 1974)). The

also serves the public interest generally by promptly removing a licensee whose qualifications have been placed in question and relieving the FCC of the necessity of undertaking a costly and time-consuming administrative hearing.<sup>5</sup> The distress sale policy thus adds an opportunity for minorities to acquire established broadcast stations at a reduced cost and through procedures that promote the public interest in prompt and efficient administrative proceedings.

Under the distress sale policy, a qualified minority applicant is one that meets the Commission's basic qualification to be a licensee and in which the minority ownership interest exceeds fifty per cent or is controlling. The distress sale price agreed to by the licensee and the minority buyer may not exceed 75 per cent of the fair market value of the property.<sup>6</sup>

There is no requirement that a licensee in such circumstances transfer its station pursuant to the distress sale policy. The decision whether to seek to use the distress sale policy or to attempt to retain the license and proceed through a hearing is a matter solely for the licensee in question. Thus, the policy does not involve any "quota" or "set-aside." No particular number or per-

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Commission has also made individual exceptions to the rule in rare circumstances. See *RKO General, Inc.*, 3 FCC Rcd 5057, 5062 (1988); *Spanish Int'l Comm. Corp.*, 2 FCC Rcd 3336, 3338 (1987), remanded, *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, Nos. 87-1285, et al. (D.C. Cir. Jan. 12, 1990); *A.S.D. Answering Service, Inc.*, 1 FCC Rcd 753, 754 (1986); *George E. Cameron, Jr. Communications*, 56 Radio Reg. 2d (P&F) 825, 828 (1984).

<sup>5</sup> See, e.g., *Grayson Enterprises, Inc.*, 47 Radio Reg. 2d (P&F) 287, 293 (1980) ("One of the purposes of the distress sale policy is to avoid the administrative burden of hearings to resolve licensee character issues.").

<sup>6</sup> See *Grayson Enterprises, Inc.*, 47 Radio Reg. 2d (P&F) at 293. The Commission had initially simply required that the price be "substantially below" the fair market value of the station. See *Northland Television, Inc.*, 72 F.C.C. 2d 51, 56-58 (1979). The Commission explained there that determining the allowable price involves a balancing of the conflicting interests of deterrence to licensee misconduct and the promotion of greater minority ownership of broadcast stations. *Id.* at 54. The Commission subsequently concluded that "those divergent goals are most adequately met when a distress sale price does not exceed 75 percent of the station's fair market value." *Lee Broadcasting Corp.*, 47 Radio Reg. 2d (P&F) 316, 317 (1980).

centage of broadcast licenses has been reserved for minorities under the distress sale or other FCC minority ownership policies.

Concerned with the continuing "dearth of minority ownership" in the telecommunications industry," the Commission expanded the distress sale program in 1982 to permit minority-controlled limited partnerships to benefit from the distress sale program. See *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C. 2d 849, 852 (1982) [hereafter *1982 Minority Policy Statement*].<sup>7</sup> The Commission determined that in the case of limited partnerships, if the general partner is a minority who holds at least a 20 per cent interest in the partnership, and who will exercise "complete control over the station's affairs," that enterprise qualifies as one with "significant minority involvement" and is eligible to participate in the distress sale program. See *id.* at 853-55.

### c. Congressional Action

Congress has repeatedly endorsed the goals of and directed the FCC to continue to implement the distress sale program as well as other FCC minority ownership policies.<sup>8</sup> Moreover,

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<sup>7</sup> The Commission's action was in response to recommendations of an advisory committee that it had created "for the purpose of exploring means to facilitate minority ownership of telecommunications properties." 92 F.C.C. 2d at 852. See *Strategies for Advancing Minority Ownership Opportunities in Telecommunications—Final Report of the Advisory Comm. on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Comm'n* (May 1982).

<sup>8</sup> As a foundation for the statutory enactments discussed below, Congress has held numerous hearings to explore the problem of lack of minority ownership of broadcast stations. See, e.g., *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) [hereafter *1989 Hearing on Minority Ownership*]; *Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations—Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986) [hereinafter

Congress has expanded on policies adopted by the Commission. In 1982, for example, Congress amended the Communications Act to authorize the FCC to award licenses by a system of "random selection," or lottery. The legislation directed the FCC, in creating any such procedure, to grant "an additional significant preference . . . to any applicant controlled by a member or members of a minority group." 47 U.S.C. 309(i)(3)(A). Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H.R. Rep. No. 765 (Conf. Rep.), 97th Cong., 2d Sess. 43 (1982) (hereafter H.R. No. 765). Consequently, Congress concluded that "[o]ne means of remedying the past economic disadvantage to minorities which has limited their entry into . . . the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media . . . , is to provide that a significant preference be awarded to minority-controlled applicants in FCC licensing proceedings." *Id.* at 44.<sup>9</sup>

*Hearings on H.R. 5373; Minority Participation in the Media—Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. (1983) [hereinafter 1983 Hearings on Minority Participation]; Parity for Minorities in the Media—Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. (1983) [hereinafter Hearings on H.R. 1155].*

<sup>9</sup> Congress had enacted a similar statutory scheme a year earlier. See Pub. L. No. 97-35, 95 Stat. 357, 736-37 (1981); H.R. Rep. No. 208 (Conf. Rep.), 97th Cong., 1st Sess. 897 (1981). The FCC chose not to implement that statute for several reasons, including a "lack of specificity in both the statute and the legislative history" regarding preferences to be accorded minorities in any lottery licensing system. *Random Selection/Lottery Systems*, 89 F.C.C.2d 257, 279 (1982). Congress enacted a revised statute within several months, re-emphasizing the seriousness with which it viewed the "severe underrepresentation of minorities" and the importance of provisions in the statute designed to enhance diversity of ownership by increasing the number of minority owners of radio and television stations. See H.R. Rep. No. 765 at 43; Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (1982).

In 1987, after the FCC had opened an inquiry concerning the validity of its minority ownership policies (see page 15 below), Congress enacted appropriations legislation containing a provision that prohibited the Commission from spending any appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a re-examination of" the distress sale and other minority ownership policies. Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-32 (1987) (Pet. App. 162a). The Senate Appropriations Committee, where the provision originated, explained: "The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority . . . audiences." S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987) [hereinafter S. Rep. No. 182]. Congress has twice extended its prohibition of the use of appropriated funds on modification or repeal of the distress sale and other minority ownership policies.<sup>10</sup>

## 2. Administrative Proceedings In This Case

This case arose from a license renewal proceeding for a television station in Hartford, Connecticut. After questions had arisen before the Commission in 1978 concerning whether the licensee of the Hartford station, Faith Center, Inc., had, in connection with other stations of which it was also the licensee, solicited funds over the air that were thereafter not used for the purposes described in the broadcast solicitations,<sup>11</sup> the Commis-

<sup>10</sup> See Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988) (Pet. App. 163a); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989); see also S. Rep. No. 101-144, 101st Cong., 1st Sess. 86 (1989); H. R. Rep. No. 299 (Conf. Rep.), 101st Cong., 1st Sess. 64 (1989); 135 Cong. Rec. H7644 (daily ed. Oct. 26, 1989); 135 Cong. Rec. S12,265 (daily ed. Sept. 29, 1989).

<sup>11</sup> See *Faith Center, Inc.*, 82 F.C.C.2d 1 (1980), *reconsid. denied*, FCC 81-235 (1981), *aff'd*, *mem.*, *Faith Center, Inc. v. FCC*, 679 F.2d 261 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983).

sion designated Faith Center's application for renewal of its Hartford television station license for a hearing in 1980. *Faith Center, Inc.*, FCC 80-680 (Dec. 21, 1980). Prior to the Commission's action, no party had filed an application seeking to compete with Faith Center's renewal application for authority to operate on that particular channel in Hartford. Faith Center's application had been filed with the Commission on December 1, 1977, and competing applications could have been filed by any party within ninety days thereafter. See 47 C.F.R. 1.516(e)(1) (1977).

In February 1981, Faith Center petitioned the Commission for permission to transfer its license under the FCC's distress sale policy, which the Commission granted. *Faith Center, Inc.*, 88 F.C.C.2d 788 (1981). The proposed sale, however, was not completed, apparently because of the minority purchaser's inability to obtain adequate financing. See J.A. 250, 257-58.<sup>12</sup> In September 1983, the Commission granted a second request by Faith Center to pursue a distress sale to another minority-controlled buyer. At that time, the Commission rejected objections to the distress sale raised by Alan Shurberg.<sup>13</sup> See *Faith Center, Inc.*, 54 Radio Reg.2d (P&F) 1286 (1983); *Faith Center, Inc.*, 55 Radio Reg.2d (P&F) 41 (MM Bur. 1984). This second authorization of a distress sale and assignment of the station license also was not consummated, apparently for similar reasons related to financing the purchase. See J.A. 426.

In December 1983, Shurberg Broadcasting of Hartford, Inc., tendered to the Commission an application for a permit to build a television station in Hartford. J.A. 388. The application was mutually exclusive with Faith Center's still-pending renewal application. In June 1984 Faith Center once again sought the Commission's approval for a distress sale. J.A. 481. Faith Center requested permission to sell the Hartford station to Astroline Communications Company, Limited Partnership, "a

<sup>12</sup> "J.A." refers to the Joint Appendix filed in the court of appeals.

<sup>13</sup> Mr. Shurberg acted at that time in his individual capacity. See 54 Radio Reg.2d (P&F) at 1287 n.10. Mr. Shurberg is sole owner of Shurberg Broadcasting of Hartford, Inc. See J.A. 396.

financially-qualified minority applicant [which is] experienced in broadcast operations." J.A. 490. Shurberg opposed the distress sale on a number of grounds, including the contention that the Commission's distress sale program violated its constitutional right to equal protection. Shurberg therefore urged the Commission to deny the distress sale request and to set the application that it had tendered for a comparative hearing with Faith Center's renewal application. See generally J.A. 780-856, 953-93.

In December 1984, the Commission approved Faith Center's petition for permission to assign its broadcast license to Astroline pursuant to the distress sale policy. *Faith Center, Inc.*, 99 F.C.C.2d 1164 (1984) (Pet. App. 113a). The Commission rejected Shurberg's constitutional challenge to the policy as "without merit" (Pet. App. 122a). In support of the minority distress sale policy, the Commission cited the findings of its *Minority Task Force Report* that there was "an acute underrepresentation of minorities among the owners of broadcast stations and that views of racial minorities were inadequately represented in the broadcast media," together with the Commission's previous observations in the 1978 *Minority Policy Statement* "that increasing minority ownership of broadcast stations would result in diversity of control of a limited resource, the broadcast spectrum, and would result in a more diverse selection of programming for the entire viewing and listening public" (*id.* at 122a-123a).

The Commission also found support in decisions of the District of Columbia Circuit, such as *West Michigan Broadcasting Co. v. FCC*, 735 F.2d at 609-11, and *TV 9, Inc. v. FCC*, 495 F.2d at 937, which have "repeatedly defined as an important public interest objective the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations" (Pet. App. 123a). And, the Commission recognized that Congress itself, in expressly requiring that the Commission incorporate "significant preferences for minority applicants . . . into any random selection licensing scheme," has "reaffirmed the importance of fostering minority ownership of broadcast stations" (*id.* at 123a-124a; see 47 U.S.C. 309(i)(3)(A)).

The Commission also rejected the competing application that Shurberg had filed in December 1983 because Shurberg had not complied with controlling regulations that had established the periods during which applications competing with renewal applications for pending stations could be filed. Those regulations precluded acceptance of applications, such as Shurberg's, that would compete with other applications that had already been designated for hearing (Pet. App. 117a-22a). See 47 C.F.R. 73.3516(e) (1983); *Chronicle Broadcasting Co.*, 44 F.C.C.2d 717, 721 (1974), *aff'd*, *Committee for Open Media v. FCC*, 543 F.2d 861 (D.C. Cir. 1976); *City of Angels Broadcasting v. FCC*, 745 F.2d 656, 662-664 (D.C. Cir. 1984).

The Commission acknowledged as "a close question" the issue whether "the public interest in permitting competing applications to be filed, as articulated in *New South [Media Corp. v. FCC]*, 685 F.2d 708 (D.C. Cir. 1982)), outweighs the goals of our minority ownership policies in this case." 99 F.C.C.2d at 1170. (Pet. App. 121a). The Commission determined, however, that the public interest goals of the distress sale program were "sufficiently important" to counterbalance the public interest in permitting competing applications to be filed. Specifically, the Commission pointed out that grant of the distress sale proposal in this case, in addition to promptly concluding the proceeding about Faith Center's qualifications, "would advance our important policy of increasing diversity of programming and ownership in the broadcast industry by providing for minority group ownership and control of this station . . ." (Pet. App. 121a). The Commission rejected Shurberg's challenge to Astroline's qualifications as a bona fide minority enterprise under the distress sale program, finding that Astroline's limited partnership ownership structure complied with FCC requirements. Pet. App. 125a-126a. The Commission also found that the price agreed to between the parties—\$3.1 million, or approximately 50 per cent of the \$6.5 million appraised value of the station—was well within the guidelines which require the distress sale price to be less than 75 per cent of the station's appraised fair market value. See Pet. App. 127a.

### 3. Intervening Developments

Shurberg sought judicial review of the Commission's order in the court of appeals, but disposition of its appeal was delayed because the Court granted, at the Commission's request, a remand of the record for further consideration in light of a separate non-adjudicatory inquiry proceeding at the Commission to explore the validity of the minority and female ownership policies including the distress sale policy. See *Notice of Inquiry on Racial, Ethnic or Gender Classifications* (MM Docket No. 86-484), 1 FCC Rcd 1315, 1317-18 (1986).<sup>14</sup>

Prior to the Commission's completion of its inquiry in that proceeding, Congress enacted and the President signed into law legislation that appropriated funds for Commission salaries and expenses for fiscal year 1988, with the following pertinent proviso:

That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended, 52 R.R. 2d [1301] (1982) and Mid-Florida Tele-

<sup>14</sup> That inquiry grew out of the court of appeals' decision in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), vacated & reh. en banc granted, Order of Oct. 31, 1985, remanded, Order of Oct. 9, 1986, mandate recalled, Order of Aug. 15, 1988. In that case a panel of the court of appeals had held that the FCC lacked statutory authority to grant enhancement credits in comparative licensing proceedings to women owners. Although the court observed that "the Commission's authority to adopt minority preferences . . . is clear" (*id.* at 1196), the court's opinion nevertheless raised questions concerning the FCC's minority ownership policies. In a request for remand in the *Steele* case, the Commission explained that it had begun to have reservations, in light of developments in the law, that it had not established an adequate factual basis for its policies encouraging female and minority ownership. Upon grant of its remand request, the Commission began the Docket No. 86-484 inquiry.

vision Corp., [69] F.C.C.2d 607 Rev. Bd. (1978) which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.<sup>15</sup>

In compliance with this legislation, the Commission ordered its MM Docket No. 86-484 closed, thereby terminating the inquiry. See *Order (MM Docket No. 86-484)*, 3 FCC Rcd 766 (1988). In addition, the Commission reaffirmed its *Order* granting the request to assign Faith Center's license for its Hartford television station to Astroline pursuant to the minority distress sale policy. *Faith Center, Inc.*, 3 FCC Rcd 868 (1988).<sup>16</sup>

#### B. The Court Of Appeals' Decision

A divided court of appeals struck down the Commission's minority distress sale policy as unconstitutional. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989) (Pet. App. 1a). In a brief per curiam opinion, the panel

<sup>15</sup> Continuing Appropriations Act For Fiscal Year 1988, Pub. L. 100-202, 101 Stat. 1329 (1987) (Pet. App. 162a). Essentially identical provisions have been enacted for subsequent fiscal years. See Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988) (Pet. App. 163a); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989).

<sup>16</sup> On November 4, 1988, an involuntary petition in bankruptcy was filed against Astroline pursuant to 11 U.S.C. Chapter 7. *In Re: Astroline Communications Co., Ltd. Partnership*, Case No. 2-88-01124 (Bankr. D. Conn.). That proceeding was subsequently converted, at Astroline's election, into a voluntary reorganization pursuant to 11 U.S.C. Chapter 11. See 11 U.S.C. 706; Order of Dec. 1, 1988 in Case No. 2-88-01124. The FCC seeks to accommodate the policies of federal bankruptcy law with those of the Communications Act. See *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974). The bankruptcy action remains pending, and Astroline has continued to operate the station as a "Debtor in Possession." Although Astroline has indicated that its financial condition and future operation of the station are uncertain (see *In re Application of Arnold L. Chase*, 4 FCC Rcd 5085 (1989)), it has not sought any authorization from the FCC to sell the station.

majority held that the policy "unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote programming diversity," specifically finding that "the program unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interests it seeks to vindicate" (Pet. App. 2a). Judges Silberman and MacKinnon, who comprised the panel majority, each filed separate opinions concurring in the judgment. See Pet. App. 3a-52a (Silberman, J.), 53a-69a (MacKinnon, J.). Chief Judge Wald filed a separate dissenting opinion. See Pet. App. 70a-112a.

Judges Silberman and MacKinnon agreed that whether or not there was a compelling governmental interest in remedying societal discrimination or promoting programming diversity,<sup>17</sup> the distress sale policy failed because it was not narrowly tailored to serve either of those interests. They found that there was no reasonable relationship between the operation of the policy and the effects of past discrimination (Pet. App. 27a-30a (Silberman, J.), Pet. App. 61a-63a (MacKinnon, J.)), and the policy unduly burdened innocent third parties by depriving them of an attractive opportunity to compete for a broadcast license (Pet. App. 31a-33a (Silberman, J.), Pet. App. 66a-68a (MacKinnon, J.)). The majority pointed out that unlike other race-conscious programs described in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), and in Justice Powell's opinion in *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), where race was one factor in a multi-factor decision,

<sup>17</sup> Judge MacKinnon did not reach the question whether these were compelling governmental interests (Pet. App. 59a-60a n.11). Judge Silberman, on the other hand, concluded that the remedial justification was insufficient to constitute a compelling interest because, assuming Congress can redress societal discrimination, general findings of minority underrepresentation in the broadcasting industry were not a sufficient factual predicate upon which Congress could act (Pet. App. 26a). Judge Silberman also found it "doubtful" (Pet. App. 50a) whether the promotion of programming diversity in the broadcast context was a compelling governmental interest. See Pet. App. 37a, 39a n.27).

race was the determinative factor under the distress sale policy (Pet. App. 45a-47a (Silberman, J.), Pet. App. 57a n.6, 62a n.15 (MacKinnon, J.)).

Chief Judge Wald dissented, concluding overall that the "majority's invalidation of the Commission's ten-year old minority distress sale program . . . impermissibly overturns a considered congressional judgment as to the appropriate means of assuring diversity of viewpoint over the national airwaves" (Pet. App. 70a). After reviewing the development of that program (*id.* at 73a-77a), as well as Congress' express and repeated endorsements of the Commission's efforts to encourage diversity in broadcast programming through programs to encourage minority ownership and control (*id.* at 77a-78a), Chief Judge Wald found that the distress sale program is "a deliberately chosen congressional policy" (*id.* at 79a). And, in light of the current case law, she concluded that the policy "is a constitutional means of pursuing Congress' objective: ensuring greater diversity in programming" (*ibid.*). In her view, "[t]he state's interest in ensuring that *all* its people have access to a wide and varied range of broadcast options seems to me to be every bit as compelling as its interest in creating a diverse student body." (*id.* at 89a).

She noted that a variety of parties had concluded that minorities have "distinct perspectives to convey" and that it seemed "foreseeable that these perspectives will find expression in the licensee's programming decision." Pet. App. 92a.<sup>18</sup> She found "most significant," however, Congress' repeated and explicit conclusion that "[d]iversity of ownership results in diversity of programming." *Id.* at 94a, quoting S. Rep. No. 100-182 at 76.

Finally, Chief Judge Wald concluded that the distress sale program did not impermissibly burden innocent nonminorities. She examined the burden that the policy placed on nonminorities as a group and on particular nonminority individuals and

<sup>18</sup> She pointed to findings of the National Advisory Commission on Civil Disorders in 1968 and the United States Commission on Civil Rights in 1977 as well as numerous earlier decisions of the court of appeals. See Pet. App. 93a.

concluded that the "distress sale policy satisfies both these standards" (*id.* at 105a). Noting "the near-monopoly exercised by nonminorities over broadcast media—they control approximately 98% of all broadcast licenses—and the very limited circumstances in which the distress sale policy can be invoked," she found "that the burden the policy places on nonminority applicants is acceptable" (*id.* at 109a).

On June 16, 1989, the court of appeals denied petitions for rehearing and suggestions for rehearing en banc filed by the FCC and by Astroline. Pet. App. 143a, 155a. Chief Judge Wald, joined by Judges Robinson, Mikva, Edwards, and Ruth B. Ginsburg, dissented from the denial of the suggestion for rehearing en banc. Pet. App. 157a-60a.

#### SUMMARY OF ARGUMENT

The distress sale policy is a race-conscious measure that has been ordered by Congress in each of the last three years as a part of the FCC's appropriations legislation. Congress enjoys broad legislative power to define and remedy the effects of prior society-wide discrimination. Although Congress need not make specific findings of discrimination in order to engage in race-conscious relief, it had available ample evidence for concluding that the lingering effects of societal discrimination were present in the broadcast industry where minorities own no more than 3.5 percent of radio and television broadcast stations despite constituting some 20 percent of the population.

Congress also had an ample basis for targeting the broadcast industry for remedial action. First, the federal government bore a special responsibility for the establishment of ownership patterns in this industry because of the FCC's authority to license broadcast stations. Second, a diversity of broadcast programming has long been an important objective underlying the regulation of broadcasting, and the absence of minority participation in broadcasting has a deleterious effect on programming diversity. Membership in a minority group is likely to provide a distinct perspective on matters of contemporary public concern that is relevant in assessing a person's potential contribution to diver-

sity, whether the desired diversity is sought for a university classroom or for the broadcast airwaves. The lack of minority participation in the ownership of broadcast stations is particularly significant in terms of realizing the goal of diversity because the FCC has long regarded ownership as a key determinant of broadcast content.

In seeking to increase the ownership of broadcast stations by minorities, Congress was engaged in far more than an abstract pursuit of the ideal of diversity. "[B]roadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). Before Congress acted, both the Kerner Commission in 1968 and the U.S. Commission on Civil Rights in 1978 had warned of the serious consequences of allowing the broadcast medium to be dominated by whites. This domination not only deprives minorities in the audience of programming that fairly reflects their tastes and viewpoints, but also prevents the larger audience from receiving the minority perspective on matters of concern to the community as a whole.

The distress sale policy is narrowly tailored to serve Congress' interest in remedying the lack of diversity in broadcast programming which has resulted from the severe underrepresentation of minorities in the broadcast industry. As discussed above, membership in a minority group is likely to provide a distinct perspective on public issues. Bringing minorities into broadcast ownership will enhance the capacity of the broadcast medium to convey that severely underrepresented perspective and thereby increase the diversity of programming because the relationship between ownership and programming has long been a fundamental tenet of the FCC's regulation of broadcasting.

The FCC, and subsequently Congress, turned to the distress sale policy and related race-conscious licensing measures only after seeking for many years to encourage diversity of ownership without consideration of race. When the agency's general approach to diversification did not succeed where minorities were concerned, and the *Kerner Commission Report* dramatically brought the problem to the FCC's attention, the FCC did

not proceed immediately to adopt the distress sale and other race-conscious licensing policies. The agency instead first resorted to rules which sought to require licensees to employ more minorities and to ascertain the needs of their minority audience. Before Congress adopted the distress sale policy in 1987, the FCC had also relaxed the minimum showing necessary to demonstrate financial qualifications to receive a broadcast license, and had increased the number of new broadcast stations available for initial licensing. In view of the failure of the FCC's various initiatives to improve significantly the level of minority participation, Congress properly exercised its broad discretion to select the methods for pursuing its objectives when it compelled the Commission to utilize the distress sale and other race-conscious licensing policies. The methods Congress has chosen do not undermine the important countervailing goal of stability in the broadcast industry.

The burden imposed on innocent nonminorities by the distress sale policy is permissible. The distress sale policy over its ten-year existence has operated to deprive nonminorities of only a minuscule fraction of their opportunities to purchase, or compete for, the license for a broadcast station. Moreover, the policy involves no attempt to remove existing owners for the purpose of making room for new minority owners.

## ARGUMENT

### I. THE DISTRESS SALE POLICY REFLECTS A CONSIDERED AND DELIBERATE CONGRESSIONAL CHOICE THAT IS WITHIN CONGRESS' POWER.

The distress sale policy is a "deliberately chosen congressional policy" (Pet. App. 79a) that employs racial criteria in a narrowly defined program designed to assist in remedying the present effects of past discrimination. These effects include a "dearth of minority ownership in the broadcast industry" (Pet. App. 134a) and inadequate representation of "the views of racial minorities . . . in the broadcast media." (Pet. App. 133a). Congress has repeatedly addressed the problem of minority ownership of radio and television stations. It has made findings that there is a

need for increased minority ownership, endorsed policies initiated by the FCC including the distress sale policy, enacted policies of its own creation and ultimately enacted into law the distress sale and other programs to increase minority representation among radio and television station owners. The distress sale policy is within Congress' broad power under the commerce clause and the fourteenth amendment.

**A. Congress Carefully Considered And Deliberately Enacted The Distress Sale Policy To Address The Identified Problem Of Lack Of Minority Ownership Of Radio And Television Stations.**

In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Chief Justice Burger observed in the plurality opinion that although "[a] program that employs racial or ethnic criteria, . . . calls for close examination," when that program is one deliberately adopted by the Congress the Court is "bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." *Id.* at 472. The Chief Justice's opinion concluded that even where legislation implicates "fundamental constitutional rights" such as the equal protection component of the fifth amendment, courts should accord "'great weight to the decisions of Congress' . . . ." *Ibid.*, quoting, *Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94, 102 (1973). See also 448 U.S. at 503-504 (Powell, J.).

In 1982 Congress enacted legislation authorizing the use of "random selection" in the FCC licensing process, but specifically requiring that significant preferences for minority applicants be incorporated into any random selection licensing scheme. See Communications Amendments Act of 1982, Pub.L. No. 97-259, 96 Stat. 1087, 1094-1095; codified at 47 U.S.C. 309(i)(3)(A) and (C)(ii). The conference report on that legislation found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe under-

representation of minorities in the media of mass communications." H.R. Rep. No. 765 at 43. The report also found ownership preferences to be "an important factor in diversifying the media of mass communications" (*ibid.*) and stated that "[t]he underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of program content." *Id.* at 40. As the conference report explained, "[i]t is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public." *Id.* at 43.

Congress expressly endorsed the FCC's minority ownership policies, including the distress sale policy, in adopting the 1982 lottery legislation, as proper means to achieve diversity. See H.R. Rep. No. 765 at 44 ("Evidence of the need for such preferential treatment has been amply demonstrated by the Commission, the Congress, and the courts. See, in this regard, Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 (1978).") And in three subsequent appropriations acts the Congress has explicitly instructed the Commission to continue to implement the minority ownership policies, "including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 . . .," in which the Commission adopted the distress sale policy. See Pub. L. No. 100-202, 101 Stat. 1329-31 (1987) (Pet. App. 162a).<sup>19</sup> The Senate Report on that legislation explained:

The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences. In approving a lottery system for the

<sup>19</sup> See also Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988) (Pet. App. 163a); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989).

selection of certain broadcast licensees, the Congress explicitly approved the use of preferences to promote minority and women ownership. See 47 U.S.C. sec. 309(i)(3)(A) and H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 37-44 (1982).

S. Rep. No. 100-182 at 76. Thus Congress has expressly determined that diversity in broadcast programming is an important policy goal, that there is a need for race-conscious remedies like the distress sale policy in licensing broadcast stations, and that increasing ownership diversity leads to increased program diversity.<sup>20</sup>

In its consideration and enactment of legislation dealing with minority ownership of broadcast stations, Congress had available to it ample evidence upon which it could reasonably base its conclusion that there is a need for these limited remedial efforts in the broadcast area. For example, in the legislative history of the 1982 lottery legislation, the conference report stated that "[e]vidence of the need for such preferential treatment has been amply demonstrated by the Commission, the Congress, and the courts." H.R. Rep. No. 765 at 44. The conference report referred specifically to the FCC's 1978 *Policy Statement* and the related *Minority Ownership Task Force Report*. The Minority Ownership Task Force had found that minorities "continue[d] to be underrepresented among broadcast station owners" and that significant barriers in the areas of financing, industry experience and information about ownership opportunities continued to "hinder the entrance of minority broadcasters." *Minority Task Force Report* Summary at 1.

The FCC's 1978 *Policy Statement* endorsed these findings, concluding that "additional measures are necessary and appropriate" to address a situation in which "the views of racial

<sup>20</sup> See *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 355 (D.C. Cir. 1989), cert. granted, *Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 715 (1990) ("Like the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' express approval. Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership in the award of broadcast licenses."); see also, *West Michigan Broadcasting Co.*, 735 F.2d at 615.

minorities continue to be inadequately represented in the broadcast media." 68 F.C.C.2d at 980-81 (footnote omitted) (Pet. App. 133a). The conference report also relied explicitly on this Court's decision in *Fullilove*<sup>21</sup> and on the decision of the court of appeals in *Citizens Communications Center v. FC*, 447 F.2d 1201 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972).<sup>22</sup>

Congress has also regularly conducted hearings to acquire information with specific reference to participation by minorities in the broadcasting industry. See n.8 above. These hearings have provided extensive evidence of the severe underrepresentation of minorities in the ownership of radio and television stations.<sup>23</sup>

<sup>21</sup> Specifically, the conference report noted this Court's reference in *Fullilove* to numerous "congressional observations with respect to the effect of past discrimination on current business opportunities for minorities . . ." 448 U.S. at 467 n.55.

<sup>22</sup> *Citizens Communications Center* did not involve a race conscious policy. However, the conference report referred to language in the opinion in that case emphasizing that an important aspect of the public interest standard of the Communications Act "is the need for diverse and antagonistic sources of information. . . . 'The Commission . . . may also seek in the public interest to certify as licensees those who would speak out with fresh voices, would most naturally initiate, encourage, and expand diversity of approach and viewpoint.' . . . As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies." 447 F.2d at 1213 n.36.

<sup>23</sup> See, e.g., *Hearings on H.R. 5373* at 1 (statement of Rep. Collins that fewer than 2% of stations minority owned); *id.* at 13 (statement of Rep. Wirth to same effect); *id.* at 89-90 (reporting figures compiled by FCC to same effect); *id.* at 116 (statement of broadcast industry executive to same effect); 1983 *Hearings on Minority Participation* at 7 (statement of Wilhelmina Cooke, representative of Black Citizens for a Fair Media, comparing minority ownership of 2% of broadcast stations to minority representation of 20% of population); *id.* at 21, 28-29 (statement of Paul Yzaguirre representing La Raza citing statistics on lack of Hispanic participation in broadcast industry); *id.* at 61-63, 138 (statement of Arnold Torres representing League of United Latin American Citizens to same effect); *id.* at 39 (statement of Peggy Charren representing Action for Children's Television citing lack of minority representation in both broadcast station and cable television system ownership); *Hearing on H.R. 1155* at 3 (statement of Rep. Collins citing statistics showing that

In addition, Congress was aware of conclusions of the *Kerner Commission Report* and the United States Commission on Civil Rights concerning the need for policies directed to the extreme underrepresentation of minorities in the broadcasting industry. See *Kerner Commission Report* at 201-12; United States Commission on Civil Rights, *Window Dressing On The Set: Women and Minorities in Television* (1977); United States Commission on Civil Rights, *Window Dressing On The Set: An Update* (1979). These reports were referred to repeatedly in various congressional hearings.<sup>24</sup>

Most recently, the Congressional Research Service conducted a study of minority ownership and programming on broadcast stations which found (1) that minorities continued to be underrepresented among those controlling broadcast stations and (2) that there is a "strong indication" that ownership of stations by minorities resulted in a greater degree of minority programming. See Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (1988) [hereafter *CRS Report*].<sup>25</sup>

In the decision below, Judge Silberman disregarded Congress' factual basis for approval of the distress sale program because Congress, in his view, failed to make "historical findings of fact," and lacked "support of any material developed in congressional hearings. . . ." Pet. App. 45a, 47a. This is, as we have shown above, a mistaken view. Congress did make findings that

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fewer than 2% of broadcast stations and 1% of cable systems are minority owned); *id.* at 147 (ownership study done by National Ass'n of Broadcasters); *id.* at 192 (survey of "Minority Business Involvement in the Telecommunications Industry" prepared for the Minority Business Development Agency of the Department of Commerce).

<sup>24</sup> See, e.g., *1983 Hearings on Minority Participation* at 7, 20, 101, 155. In addition, other studies by groups such as the NAACP, the Radio-Television News Directors Association, the Screen Actors Guild, the League of United Latin American Citizens and the National Ass'n of Broadcasters were entered into the record in these hearings. See *id.* at 46, 47, 69 170.

<sup>25</sup> The *CRS Report* found that 13.4% of stations had one or more minority owners, but that minorities held controlling interest in only 3.5% of stations. See *CRS Report* at CRS-9.

were supported by a variety of sources. Congress has conducted numerous hearings on the subject of minority ownership of broadcast stations from which it gained knowledge of the need for the distress sale policy. See, e.g., pages 25-26 and n.8 above. Even if it had not, however, as the plurality held in *Fullilove*, "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." 448 U.S. at 478. Indeed, Justice Stevens' dissent in *Fullilove* pointed out that the set-aside provisions of the legislation before the Court in that case were "not even mentioned in the . . . Reports of either the House or the Senate committee that processed the legislation, and was not the subject of any testimony or inquiry in any legislative hearing on the bill that was enacted." 448 U.S. at 549-50. The floor debate was characterized by Justice Stevens as "brief" and "perfunctory" in which "only a handful of legislators spoke and there was virtually no debate." *Id.* at 550. As the dissent below noted, "[t]hose Justices [in *Fullilove*] who voted to uphold the program did not contest Justice Stevens' assertion that congressional debate had been scanty" (Pet. App. 82a).

The Chief Justice's opinion in *Fullilove* relied extensively on a congressional report that drew "presumptions" from statistical information demonstrating substantial underrepresentation by minorities a business owners. Referring to this information, the Chief Justice's opinion quoted favorably a Congressional report that had observed that " '[t]hese statistics are not the result of random chance. The *presumption* must be made that past discriminatory systems have resulted in present economic inequities.' " 448 U.S. at 465 (Burger, C.J.), quoting H.R. Rep. No. 468, 94th Cong., 2d Sess. 30 (1975) (emphasis added). Congress relied on similar statistical materials here, concluding that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H.R. Rep. No. 765 at 43.

Justice Powell observed in *Fullilove* that Congress' "constitutional role is to be representative rather than impartial, to make

policy rather than to apply settled principles of law. . . . Congress is not expected to act as though it were duty bound to find facts and make conclusions of law." 448 U.S. at 502. Accordingly, he concluded that

Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.

*Id.* at 502-503. See also *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706, 719 (1989) (O'Connor, J.); *id.* at 736 (Scalia, J.). So too, here, Congress was not legislating in a vacuum when it enacted into law the distress sale and other minority ownership policies. The distress sale policy had been in effect for more than nine years as an administrative policy before Congress enacted it into law, and Congress was aware of "two decades of congressional, judicial and agency findings" (Pet. App. 93a (Wald, C.J.)), including its own inquiries and experience relating to the need for remedial policies in the broadcast area as well as more general findings such as the ones cited in *Fullilove*, along with findings of the *Kerner Commission Report*, reports of the U.S. Commission on Civil Rights and the FCC. See H.R. Rep. No. 765 at 44; S. Rep. No. 182 at 76.

Whether there is some irreducible minimum of evidence Congress must have to support its policy judgment that there is a need to employ race conscious policies is a question that the Court need not decide here. It is plain that the evidence before Congress in this instance exceeded any reasonable minimum that might apply.

#### **B. The Distress Sale Policy Is A Remedy That Is Within The Power Of Congress.**

In the Communications Act of 1934, Congress, pursuant to its authority to regulate interstate and foreign commerce (U.S.

Const. Art. I, § 8) assigned to the Federal Communications Commission the exclusive authority to grant licenses to build and operate radio and television stations in the United States. 47 U.S.C. 151, 301, 303, 307. The standard governing the exercise of that authority is the "public convenience, interest or necessity" (47 U.S.C. 307), and the "avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943).

Although this case involves the licensing conduct of a federal agency, the fifth amendment's due process clause contains an equal protection guarantee similar to that found in the fourteenth amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). It is thus significant, as Justice O'Connor pointed out in *Croson*, that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 109 S.Ct. at 719 (O'Connor, J.), citing *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); *Ex parte Virginia*, 100 U.S. 339, 345 (1800).<sup>26</sup>

<sup>26</sup> See also *Croson*, 109 S.Ct. at 736 (Scalia, J.) ("We have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. . . . [I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment . . .—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed . . ."); *Shurberg*, 876 F.2d at 939 (Pet. App. 80a n.13) (Wald, C.J.) ("[W]hile the congressional judgment is not dispositive, it surely makes a difference. Congress has far broader powers than does an administrative agency; its findings of fact are entitled to greater respect; and, unlike the agency, it need not compile a formal record or issue an opinion. Moreover, section 5 of the fourteenth amendment entrusts Congress with the authority to implement equal protection guarantees. These factors do not obviate the need for judicial review, but they do shape the contours of our inquiry.").

Congress' broad remedial powers to employ race-conscious policies to remedy the effects of past discrimination, based on its expansive authority generally and enhanced by the fourteenth amendment, have been acknowledged repeatedly. See, e.g., *Fullilove*, 448 U.S. at 477-480 (Burger, C.J.); *id.* at 502-03 (Powell, J.); *Croson*, 109 S. Ct. at 719 (O'Connor, J.); *id.* at 736-37 (Scalia, J.). The broadcast industry is a particularly appropriate area within which Congress "may identify and redress the effects of society-wide discrimination," *Croson*, 109 S.Ct. at 719 (O'Connor, J.), because (1) a federal licensing agency has played a major role in the establishment of ownership patterns in this industry (see pages 30-31 below) and (2) "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).<sup>27</sup>

Broadcasting, unlike other industries, such as the construction industry in *Fullilove* and *Croson*, involves the use of a unique, limited resource pursuant to a system of government licensing. The most desirable licenses—those using the frequencies with widest coverage and in the largest communities—were issued during the formative years of the industry, which also happened to be when societal discrimination against minorities was at its peak.<sup>28</sup> These stations were obtained at a modest cost

<sup>27</sup> See also U.S. Commission on Civil Rights, *Window Dressing on the Set* at 1 ("Television plays the dominant role in the mass communication of ideas in the United States today. . . . Television does more than simply entertain or provide news about major events of the day. It confers status on those individuals and groups it selects for placement in the public eye, telling the viewer who and what is important to know about, think about, and have feelings about.").

<sup>28</sup> Percy Sutton, Chairman of Inner City Broadcasting, testified before a congressional committee in 1989: "When I sought—when my family sought to buy a radio station in the year 1942, in San Antonio, Texas, nobody would sell them a radio station. There was a building, sir, in San Antonio, Texas, that we owned, that we could not even collect rent from. We had to have a white person collect the rent." 1989 *Hearing on Minority Ownership* at 16.

by today's standards.<sup>29</sup> Entrenched ownership patterns understandably have developed because, as this Court has recognized, the Commission has over the years "consistently acted on the theory that preserving continuity of meritorious service furthers the public interest." *FCC v. NCCB*, 436 U.S. at 805. The FCC's justifiable efforts to preserve existing meritorious service have, however, had the effect of inhibiting the opportunities for minorities to own those desirable broadcast stations that were initially licensed during the period when minorities did not participate in the industry either as owners or employees. See, e.g., *Minority Task Force Report* at 10 (noting the difficulty in minorities' entry into the broadcast industry by applying for a new station on an unused frequency because "there are very few unused frequencies available, particularly in communities of substantial size." ).<sup>30</sup>

Thus, after more than forty years of FCC licensing of radio and television stations—from 1934 until 1978—less than one per cent of those stations were controlled by minorities, despite the fact that minorities represented 20 per cent of the population. Pet. App. 133a. Congress found that this severe underrepresentation of minorities did not occur by chance, but was one of the "effects of past inequities stemming from racial and ethnic discrimination . . . ." H.R. Rep. No. 765 at 43. The distress sale program thus is, as the dissent noted below, a remedial effort in the broad sense: "it seeks to address (or remedy) a societal problem (the underrepresentation of minorities in the broadcast field, and the consequent lack of diverse programming) which has been caused by past racial discrimination." Pet. App. 110a.

<sup>29</sup> During that same testimony, Percy Sutton described this effect of past discrimination as a "black tax": "[M]inorities, and specifically minorities who are of African descent, have not had the opportunity. In the past, I remarked upon this as a black tax. That is, when we buy a radio station now, we must pay much more money." 1989 *Hearing on Minority Ownership* at 16.

<sup>30</sup> As noted below (n.35), the Commission has sought to address the lack of available frequencies by adding additional frequencies for new applicants.

**II. PROMOTING DIVERSITY IN BROADCAST PROGRAMMING IS A COMPELLING GOVERNMENTAL INTEREST THAT IS AN APPROPRIATE BASIS FOR A RACE-CONSCIOUS GOVERNMENT POLICY.**

This Court has recognized on a number of occasions that diversity of ownership of the mass media, including radio and television stations, is likely to enhance the diversity of ideas and expression favored by the first amendment. See, e.g., *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *FCC v. NCCB*, 436 U.S. at 795. Congress, the court of appeals and the FCC have also all found that this general principle is specifically applicable to the regulation of broadcasting. See *Citizens Communications Center v. FCC*, 447 F.2d at 1213 n.36; H.R. Rep. No. 765 at 40; S. Rep. No. 182 at 76; *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d at 394; 1978 Minority Policy Statement, 68 F.C.C. 2d at 980-981 (Pet. App. 134a-137a).

In the context of higher education, promotion of diversity has been found to constitute a sufficiently important or compelling government interest to warrant the use of race conscious policies. See *Bakke*, 438 U.S. at 311-312 (Powell, J.) (concluding that race could be considered as one factor in a university's admission program because "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education."). Justice O'Connor has observed that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J.), citing *Bakke*, 438 U.S. at 311-315 (Powell, J.); *Wygant*, 476 U.S. at 306 (Marshall, J., dissenting); *id.* at 315-17 (Stevens, J., dissenting). And Justice O'Connor added: "[N]othing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts

but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." *Id.* at 286 (O'Connor, J.).

The court of appeals has repeatedly found that promoting diversity, in the context of broadcast station ownership, is analogous to the promotion of diversity in the context of higher education, as discussed by Justice Powell in *Bakke*, and is a compelling government interest warranting use of race-conscious government policies. In *TV 9, Inc.* the court of appeals noted the Commission's longstanding policy under the Communications Act of promoting diversity of ownership of broadcast stations along with the established connection between ownership diversity and the "diversity of ideas and expression required by the First Amendment." *TV 9, Inc.*, 495 F.2d at 937. The court also took note of the extreme underrepresentation of minorities in the ownership of broadcast stations. See *id.* at 937 n.28. Based on these considerations, the court concluded that

when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news.

*Id.* at 938 (footnotes omitted). See also *Garrett v. FCC*, 513 F.2d at 1063 ("The entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that 'reasonable expectation,' without 'advance demonstration,' gives them relevance." (footnotes omitted)).

A decade later, the court in *West Michigan Broadcasting Co. v. FCC* again concluded that promotion of diversity was a sufficiently important governmental interest to warrant a race conscious policy: "Clearly, under Justice Powell's approach the FCC's goal of bringing minority perspectives to the nation's

listening audiences would reflect a substantial government interest within the FCC's competence that could legitimize the use of race as a factor in evaluating permit applicants." *West Michigan Broadcasting Co.*, 735 F.2d at 614. The court of appeals recently reiterated this view, concluding that "none of the [Supreme] Court's recent cases has undermined the holding in *West Michigan*." *Winter Park Communications*, 873 F.2d at 353.

The Commission has set forth in detail the diversity-related basis for its minority ownership policies:

Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment. . . . [T]he Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming. . . . In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

*1978 Minority Ownership Policy Statement*, 68 F.C.C. 2d at 980-981 (Pet. App. 133a-134a) (citing *Minority Task Force Report*). The goal of the FCC's race-conscious policies, now mandated by Congress, is thus quite different from the "role model" theory criticized in *Wygant* (see 476 U.S. at 274-275) in that the FCC policies assume "that viewers and listeners of every race will benefit from access to a broader range of broadcast fare, not that consumers will inevitably gravitate towards programming disseminated by licensees of their own race" (Pet. App. 86a, Wald, C.J., dissenting).<sup>31</sup>

<sup>31</sup> See also *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264-1265 (1982), aff'd, *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 ("[T]he public interest benefits and advantages of minority ownership are not dependent on proof that the minority owned station will specifically program to meet minority needs" but are based on the agency's prediction that "minority con-

### III. THE DISTRESS SALE POLICY HAS BEEN NARROWLY TAILORED TO ACHIEVE ITS INTENDED GOAL.

The Court has not thus far discussed how the "narrowly tailored" aspect of a "strict scrutiny" standard of review should be applied to a race conscious program aimed at promoting diversity (Pet. App. 59a n.11, MacKinnon J., concurring). For the reasons that follow, however, the Court should conclude that the distress sale policy is narrowly tailored to achieve its objective.

#### A. A Nexus Between Ownership And Programming Has Been Established.

The FCC determined in its *1978 Policy Statement* that "diversification in the areas of programming and ownership—legitimate public interest objectives of this Commission—can be more fully developed through our encouragement of minority ownership of broadcast properties." 68 F.C.C. 2d at 981 (Pet. App. 134a). This conclusion was based in part on a finding of the agency's Minority Ownership Task Force that

Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, nonminority audience will be deprived of the views of minorities.

*Minority Task Force Report* at 1.

trolled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation. . . ."); *Clear Channel Broadcasting*, 83 F.C.C. 2d 216, 221 (1980), aff'd, *Loyola Univ. v. FCC*, 670 F.2d 1222 (D.C. Cir. 1982) ("[W]e believe that minority-controlled stations can have the additional function of educating non-minorities about minority viewpoints. . . ."); *1978 Minority Policy Statement*, 68 F.C.C. 2d at 981 (Pet. App. 134a).

Congress expressly found in 1982 that the "nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the Commission and the courts." H.R. Rep. No. 765 at 40. In 1987 Congress reiterated this conclusion, stating that "[d]iversity of ownership results in diversity of programming." S. Rep. No. 182 at 76.<sup>32</sup> This was, as the report noted, consistent with earlier determinations made by the Commission and the court of appeals. See, e.g., *TV 9, Inc.*, 495 F.2d at 938 ("[I]t is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved, to be significantly influential with respect to editorial comment and the presentation of news.").

The Kerner Commission had earlier arrived at the same conclusion as the FCC's *Minority Task Force Report* concerning the effects of a lack of minority participation in broadcasting:

The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slight and indignities are part of the Negro's daily life, and many of them come from what he now calls the "white press"—a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform and educate the whole of our society. . . . The absence of

<sup>32</sup> As noted earlier, the Commission had begun an inquiry in 1986 to examine whether it had established an adequate factual basis, in light of its then understanding of developing legal standards governing race-conscious policies, for a determination that there exists "a nexus between minority/female ownership and viewpoint diversity. . . ." *Notice of Inquiry*, 1 FCC Rcd at 1317. See page 15 above. Congress concluded that "the inquiry is unwarranted" in light of Congress' repeated findings that such a nexus does exist. S. Rep. No. 182 at 76. The Congressional Research Service study of minority ownership and programming diversity found a "strong indication" that such a connection exists. See *CRS Report* Appendix at 1.

Negro faces and activities from the media has an effect on white audiences as well as black. If what the white American reads in the newspapers and sees on television conditions his expectation of what is ordinary and normal in the larger society, he will neither understand nor accept the black American.

*Kerner Commission Report* at 203. A decade later, the United States Commission on Civil Rights endorsed this view, summarizing that the Kerner Commission had "concluded that a mass medium dominated by whites will ultimately fail in its attempts to communicate with an audience that includes blacks. A similar conclusion could be drawn in regard to other racial and ethnic minorities . . . ." United States Commission on Civil Rights, *Window Dressing On The Set: Women and Minorities in Television 2* (1977).

Testimony in congressional hearings concerning minority participation in the broadcasting industry has echoed the same themes.

[T]he importance of minority ownership is clear. Minorities need to have a voice that speaks to them, for them and about them. Black owned radio and television stations are not afraid to push voter registration. Black owned broadcast stations are not afraid to talk about South Africa. In particular, black owned radio stations give black politicians a chance to be heard. Black people

listen to black radio. Because black radio stations still subscribe to the concept of operating in the public interest. Black radio is local. It's the church program on Sunday, it's the community school, it's the forum for issues that many non-minority owned radio owners would consider too "sensitive," too "one issue oriented" or "not sexy enough."

*Hearings on H.R. 5373* at 164-165 (statement of Jesse L. Jackson).

**B. Adoption Of The Policy Followed Implementation Of Alternative Methods Of Addressing The Lack Of Minority Ownership That Proved Inadequate.**

The Court in other contexts has emphasized that an important consideration in a "narrowly tailored" analysis is whether there has been prior consideration of the use of alternatives. See *Croson*, 109 S.Ct. at 728; *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Fullilove*, 448 U.S. at 463-467 (Burger, C.J.); *id.* at 511 (Powell, J.). In this regard, the FCC for many years followed policies of encouraging diversity of ownership without consideration of race, i.e., it sought to minimize concentration of control of broadcast stations and thus maximize the opportunities for individuals or organizations to control stations. See page 2 above. As indicated earlier, despite following such policies for several decades, minorities remained severely under-represented in the ownership of broadcast stations. Moreover, the "distress sale policy was adopted only after specific findings by the FCC that equal employment opportunity rules and ascertainment policies alone were insufficient to accomplish significant minority participation in programming." Pet. App. 97a-98a (Wald, C.J., dissenting) (footnotes omitted). See also *1978 Minority Policy Statement*, 68 F.C.C.2d at 981 (Pet. App. 130a-33a); *Random Selection/Lottery Systems*, 88 F.C.C.2d 476, 489 (1981).

Assuming that the FCC was required to consider alternatives specifically addressed to minorities' lack of financing to enter into broadcast ownership (Pet. App. 30a-32a, Silberman, J), the FCC had already taken a number of actions specifically addressed to these entry barriers before Congress acted in 1987 to

compel the distress sale and other race-conscious policies. For example, the minimum showing necessary to demonstrate financial qualifications to receive a radio or television station license was reduced in order to lower this barrier to minority applicants.<sup>33</sup> In addition, the Commission adopted procedures to disseminate more widely information about the availability of potential minority buyers of broadcast stations.<sup>34</sup> The Commission also has taken steps to increase the total number of radio and television stations, thus increasing the opportunities for minorities to enter the broadcast industry.<sup>35</sup> Despite these substantial initiatives not involving racial licensing preferences, the Commission concluded in 1982 that the "dearth of minority

<sup>33</sup> Section 308(b) of the Communications Act, 47 U.S.C. 308(b), authorizes the FCC to elicit information from applicants regarding their financial qualifications to operate a station. The Commission had required applicants to demonstrate the availability of sufficient funds to construct and operate the station for one year. See *Ultravision Broadcasting*, 1 F.C.C. 2d 544 (1965). This requirement was identified by the Minority Ownership Task Force as one of the barriers to increased minority ownership. See *Minority Task Force Report* 11-12. The requirement subsequently was reduced to three months. See *New Financial Qualifications for Aural Applicants*, FCC 78-556 (Aug. 2, 1978); *New Financial Qualifications Standard for Broadcast Television Applicants*, FCC 79-299 (May 11, 1979).

<sup>34</sup> See FCC EEO-Minority Enterprise Division, *Minority Ownership of Broadcast Facilities: A Report* 8-9 (Dec. 1979) (describing agency establishment of "a listing of minority persons interested both in purchasing broadcast stations and in making themselves known to broadcast station sellers and brokers").

<sup>35</sup> See, e.g., *Availability of FM Broadcast Assignments*, 101 F.C.C. 2d 638 (1985), reconsid. granted in part and denied in part, 59 Radio Reg. 2d (P&F) 1221 (1986), aff'd, *National Black Media Coalition v. FCC*, 822 F.2d 277 (2d Cir. 1987); *Clear Channel Broadcasting in the AM Band*, 78 F.C.C. 2d 1345 (1980); *Low Power Television Service*, 51 Radio Reg. 2d (P&F) 476 (1982), reconsid. granted in part and denied in part, 53 Radio Reg. 2d (P&F) 1267 (1983).

ownership' in the telecommunications industry" continues to be a "serious concern" warranting expansion of the distress sale policy. *1982 Policy Statement*, 92 F.C.C.2d at 852.<sup>36</sup>

The range of available alternatives for increasing minority participation in broadcast programming is limited. Section 3(h) of the Communications Act, 47 U.S.C. 153(h), for example, provides that a broadcaster "shall not . . . be deemed a common carrier." The Court has held that "consistently with the policy of the Act to preserve editorial control of programming in the licensee," Section 3(h) "forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (footnote omitted). The Court, moreover, has made clear that "the important purposes of the Communications Act" to preserve for broadcasters a high degree of editorial discretion and to minimize government control over broadcast content are "grounded in the First Amendment." *FCC v. League of Women Voters of California*, 468 U.S. 364, 379-80 (footnote omitted), citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 94, 110, 126. Given the limitations on its authority in this area, the FCC has traditionally sought to promote diversity by structural regulations, of which the distress sale policy is one example, "without on-going government surveillance of the content of speech." *FCC v. NCCB*, 436 U.S. at 801-02; see also *id.* at 780-781 and nn.1-3.

Even where structural regulations are concerned, the FCC's steps to promote diversity have been limited by important countervailing public interest considerations. The Commis-

<sup>36</sup> In 1985, the Commission proposed to expand further the availability of the distress sale policy by broadening the time period during which a licensee could elect to sell its station pursuant to that policy. See *Distress Sale Policy for Broadcast Licensees—Notice of Inquiry*, 50 Fed. Reg. 42047 (1985). That proceeding was recently terminated without any action by the Commission without prejudice to further consideration following resolution of the instant litigation. *Distress Sale Policy for Broadcast Licensees—Order*, FCC 89-374 (Jan. 11, 1990).

sion, for example, "has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest" and thus "both the Commission and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause." *FCC v. NCCB*, 436 U.S. at 805-806 (citations omitted). The renewal expectancy policy, however, severely limits minorities' ability to compete for existing, established stations, which occupy the overwhelming majority of available broadcast frequencies.<sup>37</sup>

Based on the Commission's experiences and the nature of the broadcasting industry, Congress could reasonably conclude that the distress sale policy is an appropriate and limited method of enhancing minorities' ability to acquire established stations without undermining the important goal of stability in the industry and without, as shown below, significantly harming non-minorities.<sup>38</sup> As Chief Justice Burger's opinion in *Fullilove* declared, "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." 448 U.S. at 480 (citation omitted).<sup>39</sup>

<sup>37</sup> As noted above (see note 35), the Commission has sought, as part of its overall efforts to promote minority ownership, to make available new allocations of radio and television stations, including new services such as low power television, for which minorities can compete without having to overcome an incumbent licensee's renewal expectancy.

<sup>38</sup> The distress sale policy focuses on existing stations, providing minorities a limited form of access to established broadcasting operations. In this respect, the distress sale policy differs from the comparative preference policy before the Court in *Metro Broadcasting, Inc. v. FCC*, No. 89-453, which generally involves applications for new stations.

<sup>39</sup> In addition, Chief Justice Burger noted in *Fullilove* that the set-aside there in issue was "appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment." 448 U.S. at 489 (footnote omitted). The same can be said of the distress sale program ordered by Congress. When Congress first ordered the FCC to retain the program in 1987, it did so for one fiscal year. Congress has twice ordered the program extended on a yearly basis. See n. 10 above. Con-

### C. The Policy's Impact on Nonminorities Is Minimal.

We do not contend that a congressionally-enacted race-conscious program in which a benefit is awarded exclusively on the basis of race could never be found to place an unlawfully heavy burden on nonminorities. The distress sale program, however, does not place an undue burden on nonminorities, either in the individual circumstances of this case or, more generally, from the perspective of all nonminorities interested in entering the broadcast industry.

For example, respondent Shurberg and any other nonminority have three options for acquiring a broadcast station—they can apply for a new station, buy an existing station, or file a competing application against a renewal application of an existing station. See *Minority Task Force Report* at 9-10. The distress sale policy has no effect on applications for new stations or timely filed competing applications that challenge renewals. The policy is operative only where the qualifications of an existing licensee to continue broadcasting have been designated for hearing and no other applications for the station in issue were on file at the Commission at the time of the designation order. See *Clarification of Distress Sale Policy*, 44 Radio Reg.2d (P&F) 479 (1978). Moreover, the decision whether to seek to transfer a station pursuant to the distress sale policy is solely within the discretion of the licensee whose qualifications are at issue in the hearing. There is no requirement that the licensee make such election—it is free to choose to attempt to retain the license and proceed through the hearing, in which case no one—whether minority or non-minority—may compete for the license until issues concerning the incumbent licensee's qualifications have been resolved.

Nor does the distress sale policy involve a "quota" or "set-aside." No particular number or percentage of licenses has been reserved for minorities.<sup>40</sup> In fact, distress sales have represented

gress can continue to extend the program, eliminate the program, or leave it to the FCC's discretion.

<sup>40</sup> Insofar as the distress sale policy does reserve certain opportunities exclusively for minorities, it goes beyond the type of diversity-based, race-

only a tiny fraction of all applications for FCC approval of broadcast station transfers. As Chief Judge Wald observed below, under the distress sale policy, "[a]s in *Fullilove*, non-minority firms remain free to compete for the vast majority of licensee opportunities available" (Pet. App. 106a).<sup>41</sup>

From fiscal years 1979 through 1988, only 38 distress sales were approved by the FCC.<sup>42</sup> Over the same period, the FCC approved approximately 10,000 sales of broadcast stations.<sup>43</sup>

conscious policy that Justice Powell was prepared to accept in *Bakke*. See 438 U.S. at 315-20. The Court's subsequent decision in *Fullilove*, however, upheld a statute under which there was a distinct possibility that nonminorities would have no opportunity to compete for 10% of the funds authorized thereunder. See *Bakke*, 438 U.S. at 378-79 (Brennan, White, Marshall and Blackmun, JJ.) (disagreeing with Justice Powell's view that the Davis Medical School's special admissions plan was fatally defective because it reserved openings exclusively for minorities).

<sup>41</sup> The policy does involve individualized consideration of each distress sale request. As this case itself illustrates, the FCC entertains, on a variety of grounds, objections to petitions for distress sale authorizations. Moreover, the FCC has made clear that all distress sales would "be scrutinized closely to avoid abuses." 1978 *Policy Statement*, 68 F.C.C.2d at 983 (Pet. App. 139a); see also 1982 *Policy Statement*, 92 F.C.C.2d at 855 ("[I]n order to avoid 'sham' arrangements, we will continue to review such [partnership] agreements to ensure that complete managerial control over the station's operations is reposed in the minority general partner(s)."). This Court has not held, as Judge Silberman's opinion below suggests, that a program must provide an "opportunity here to ensure that participating minority enterprises have actually been disadvantaged by past discrimination or its effects" (Pet. App. 30a). As Justice O'Connor observed in *Wygant*, "the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored' . . . ." 476 U.S. at 287.

<sup>42</sup> See Pet. App. 61a, citing *Distress Sales Approved*, FCC Consumer Assistance & Small Business Div. (Oct. 18, 1988).

<sup>43</sup> The Commission actually approved 21,200 assignments or transfers during this period. See Broadcast/Mass Media Application Statistics, Annual Reports of the Federal Communications Commission FY 1979—FY 1988. Agency staff familiar with this area estimate that corporate reorganizations and similar technical changes represent at least one-half of the applications granted. These types of transfers do not constitute "sales" of stations in the common sense of that term.

Thus, during its existence, the minority distress sale policy has accounted for less than four tenths of one per cent of all broadcast station sales; or, conversely, over 99.6 per cent of all broadcast station sales did *not* involve the distress sale policy. Similarly, during the same period, approximately 21,000 license renewal applications were filed, but only 94, or 0.5 per cent were designated for hearing and thus even eligible for disposition pursuant to the distress sale policy.<sup>44</sup> In sum, the distress sale policy operates to foreclose to nonminorities only a minuscule number of opportunities to acquire a broadcast station.

Even in those few cases where a distress sale becomes a possibility because an incumbent licensee finds itself in difficulty before the Commission, nonminorities are not necessarily foreclosed from having the opportunity to acquire the station at issue. If a nonminority (or a minority for that matter) files a competing application before the incumbent licensee's renewal application is designated for hearing, the distress sale option is not available. See page 42 above. Thus, a nonminority can prevent the distress sale policy from ever coming into play. In this case, for example, had respondent Shurberg filed its competing application in a timely manner, before the Commission designated Faith Center's renewal application for hearing, there could have been no distress sale. We note that timely filed competing applications against two of Faith Center's other stations did, in fact, prevent their sale under the distress sale policy. See *Faith Center, Inc.*, 89 F.C.C. 2d 1054 (1982) and 90 F.C.C. 2d 519 (1982).<sup>45</sup>

A comparison of the foregoing statistics with similar information considered in *Fullilove* further demonstrates that the impact of the distress sale policy on nonminorities is not so great as

<sup>44</sup> See Broadcast/Mass Media Application Statistics, Annual Reports of the Federal Communications Commission FY 1979–FY 1988.

<sup>45</sup> Even when the distress sale option is exercised, nonminorities can seek to become limited partners in a minority controlled entity and share in whatever financial benefits arise from operating a broadcast station on that frequency. See 1982 *Minority Policy Statement*, 92 F.C.C.2d at 853-855; Pet. App. 108a, Wald, C.J., dissenting. In this case, the minority general partner held a 21 per cent ownership interest in the limited partnership. See Pet. App. 10a.

to make the policy unconstitutional. Chief Justice Burger concluded in *Fullilove* that the burden on nonminority firms was "relatively light" because the percentage of funds available to minorities alone was a minuscule percentage (0.25 per cent) of the amount spent on construction in the United States. 448 U.S. at 484-485 n.72. See also *id.* at 515 (Powell, J.). The impact of the distress sale program is similarly small. Although Congress neither set aside stations for minority ownership nor limited the number of broadcast stations that could be transferred under the distress sale program, Congress could reasonably know from the Commission's experience that there were, on average, fewer than 5 distress sales per year since the inception of the program in an industry currently made up of some 12,000 radio and television licensees.<sup>46</sup> This means that, on average, only about 0.20 per cent of renewal applications filed each year have resulted in distress sales since the policy was begun in 1978.

When a race-conscious policy involves entry into employment, rather than layoffs of established employees, "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282-283 (Powell, J.); *id.* at 294-295 (White, J.). In this regard, Chief Judge Wald correctly observed below that "the distress sale policy involves entry into a market [and] is far more analogous to 'hirings' than to 'firings.' . . . Because of the unique and unpredictable nature of such situations, a distress sale can hardly be said to disrupt the settled expectations of potential licensees" (Pet. App. 107a).<sup>47</sup> In addition, as Chief Justice Burger stated

<sup>46</sup> There were 13,178 radio and television broadcast stations authorized at the close of fiscal year 1988, of which 11,769 were operating and 1409 were not on the air. Annual Report of the Federal Communications Commission—FY 1988 at 33.

<sup>47</sup> Recent events, in fact, indicate that the only expectation Shurberg could reasonably have had that may have been disrupted by the distress sale policy was the right to participate in a comparative hearing with at least four other parties who also desire to operate the station. That is the number of parties who filed competing applications when the license for this station was due for renewal in 1989. Shurberg did not lose any expectation that it could acquire the station without competition from numerous other parties.

in *Fullilove*, “[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such ‘a sharing of the burden’ by innocent parties is not impermissible.” 448 U.S. at 484, quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 (1976). See also *Wygant*, 476 U.S. at 280-281 (Powell, J.) (“As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.”).

### CONCLUSION

The judgment of the court of appeals should be reversed.  
Respectfully submitted.

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*Associate General Counsel*

C. GREY PASH, JR.  
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*Federal Communications Commission\*\**

FEBRUARY 1990

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\* Counsel of Record

\*\* The Acting Solicitor General has authorized the filing of this brief in order for the Court to have the benefit of the views of the Commission. The views of the United States will be expressed in a brief filed by the Acting Solicitor General.

No. 89-700

14

Supreme Court, U.S.

FILED

FEB 20 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

In The  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1989

Astroline Communications Company  
Limited Partnership,  
*Petitioner,*  
v.

Shurberg Broadcasting of Hartford, Inc.,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

**OPPOSITION TO MOTION FOR LEAVE TO FILE  
BRIEF AMICUS CURIAE**

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February 20, 1990

9 p

In The  
**SUPREME COURT OF THE UNITED STATES**

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**On Writ of Certiorari to the  
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for the District of Columbia Circuit**

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**OPPOSITION TO MOTION FOR LEAVE TO FILE  
BRIEF AMICUS CURIAE**

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Respondent Shurberg Broadcasting of Hartford ("Shurberg") hereby opposes the Motion for Leave to File Brief Amicus Curiae submitted in this case by the Committee to Promote Diversity ("CPD"). In its brief, CPD supports the Petitioner in this case and is, therefore, adverse to Shurberg's position. As set forth below, the identity of those representing CPD here creates at least an appearance of impropriety which can be corrected only by rejection of CPD's brief.

As indicated in CPD's Motion, Shurberg did not consent

to the filing of CPD's Brief.<sup>1</sup> Shurberg first learned of CPD's interest in submitting a brief herein during the afternoon of February 7, 1990, two days before briefs in support of Petitioner were due to be filed. Undersigned counsel was contacted, by telephone and telecopied letter, by CPD's counsel of record. That same afternoon, undersigned counsel consulted with his client and was advised that Shurberg would not consent to CPD's request for reasons set out below. CPD's counsel of record was notified of this the same afternoon.

The factual basis for Shurberg's opposition is as follows. The law firm of CPD's counsel of record is Pepper & Corazzini. An associate at that firm, Neal J. Friedman, was previously associated with the firm of Bechtel & Cole, Chartered, which has represented Shurberg throughout this litigation. During his term of employment at Bechtel & Cole, Chartered, Mr. Friedman performed legal services for Shurberg in connection with this litigation. Moreover, during that term Mr. Friedman's office was immediately adjacent to that of undersigned counsel; in view of his physical proximity and the limited number of attorneys in the firm, Mr. Friedman had access to a wide variety of information concerning Shurberg and its conduct of this case.

The individual identified as "Chief Counsel" for CPD in its brief is Thomas A. Hart, Jr. Although not disclosed by CPD in its brief, Mr. Hart was counsel for Petitioner Astroline Communications Company Limited Partnership ("Astroline") from its formation, in 1984, until his substitution as counsel of record before the Court of Appeals, below, in May, 1989. *See, e.g.,* J.A. 30, 33. Also not disclosed by CPD is the fact that Mr. Hart was, at least for a time, a general partner in Astroline, according to a report submitted by Astroline to the Federal Communications Commission ("FCC") on September 13, 1985.

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<sup>1</sup> By contrast, Shurberg has consented to all other *amici* seeking such consent.

Also not disclosed by CPD is the fact that Mr. Hart appears to have been the initial promoter of Astroline -- he had previously represented Astroline Company (a separate entity which is a non-minority participant in Astroline, *see* J.A. 68-69), and was reported to have "arranged [the] marriage" between Astroline Company and Richard Ramirez which culminated in the formation of Petitioner Astroline. *Hartford Courant*, February 3, 1985, "Channel 18 Sale: Perfume, Preacher, and a Whiff of Intrigue", at A20.<sup>2</sup>

Because of the foregoing facts, Shurberg refused to consent to the filing of the CPD brief.<sup>3</sup> Disciplinary Rule 4-101(B) of the District of Columbia Bar provides that

... a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client. . . .

Shurberg is concerned that the facts and circumstances presented here could result in the disclosure (whether or not

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<sup>2</sup> The *Hartford Courant* quoted Mr. Hart as stating that, after first meeting Mr. Ramirez, "I kind of stashed [Mr. Ramirez] away as a potential participant in the Hartford deal." *Id.* A relevant portion of the *Hartford Courant* article is set forth in the attachment hereto.

<sup>3</sup> In advising CPD's counsel of record of the denial of consent, Shurberg's counsel referred only to the apparent conflict presented by the possible involvement of Neal J. Friedman. No reference was made at that time to the involvement of Mr. Hart because it had not been disclosed theretofore to undersigned counsel that Mr. Hart would be involved at all; undersigned counsel learned of Mr. Hart's involvement only upon receipt of CPD's brief on February 9, 1990.

intentional) of confidences.

Mr. Friedman represented Shurberg and had access to confidential information, strategies and deliberations with regard to Shurberg in this very case. Mr. Friedman would therefore be prevented from himself representing another party whose interests in this matter are adverse to Shurberg's. *E.g., Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980); *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980).<sup>4</sup> Any knowledge which Mr. Friedman obtained in the course of his representation of Shurberg -- and, therefore, Mr. Friedman's disqualification from representing an adverse party -- are attributable to his new law firm. See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir.), *cert. denied*, 438 U.S. 955 (1978); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976). Any efforts (*e.g.*, a "Chinese wall") which might be made<sup>5</sup> to prophylactically shield Mr. Friedman from any involvement in this matter at his new firm could not cure that firm's disqualification. As stated in *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, *supra*,

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<sup>4</sup> In the related, albeit distinct, context of whether an attorney may litigate disqualification questions independent of the client's litigation, this Court has consistently held that the interests of clients and the integrity of the process of federal court litigation are paramount to the interests of attorneys who seek to preserve their attorney-employment positions when disqualification questions arise. *Richardson-Merrill, Inc. v. Koller*, 472 U.S. 424 (1985); *Flanagan v. United States*, 465 U.S. 259 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 445 U.S. 368 (1981).

<sup>5</sup> During a brief telephone conversation on the afternoon of February 7, 1990, CDP's counsel of record informally advised undersigned counsel that one or more affidavits addressing, and supposedly precluding, any inference of a conflict of interest or other impropriety had been or were being prepared. No such affidavits have as yet been provided to undersigned counsel or (to the best of my knowledge) to the Court.

. . . we do not recognize the wall theory as modifying the presumption that actual knowledge of one or more lawyers in a firm is imputed to each member of the firm. 580 F.2d at 1321.

Nor is it necessary for Shurberg to establish that confidential information has in fact been used against it in the representation of CPD. As stated in *Trone v. Smith*, *supra*,

Disqualification does not depend upon proof of the abuse of confidential information. Because of the sensitivity of client confidence, disqualification is required when lawyers change sides in factually related cases. 621 F.2d at 1001.

Shurberg is understandably unwilling to consent to representation of an adverse *amicus* by a firm with access to substantial confidential information about Shurberg.

Aggravating the matter of Mr. Friedman's involvement is the matter of Mr. Hart's involvement. Because of his extensive role in the formation of Astroline, and because he was a general partner in Astroline during the pendency of this case below, Mr. Hart is more than just Astroline's former counsel -- he is in a sense a surrogate Astroline. Shurberg does not believe that it is proper for an individual so integrally involved with Petitioner to ally with a firm whose attorneys include a former counsel for Respondent for the purpose of submitting a brief adverse to Respondent's interests here.

Ethical Consideration 9-2 of the District of Columbia Bar states in relevant part:

Public confidence in the law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. . . . When explicit ethical

guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

This is, of course, merely an "ethical consideration", and not a disciplinary rule. It is therefore hortatory rather than mandatory. Nevertheless, the confluence of factors presented here -- most notably Mr. Friedman's prior representation of Shurberg and Mr. Hart's involvement as "Chief Counsel" for CPD and his substantial involvement in Petitioner Astroline -- create an appearance of impropriety which the Court should not condone. Accordingly, Shurberg opposes CPD's Motion for Leave to File its brief herein.<sup>6</sup>

Respectfully submitted,

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February 20, 1990

---

<sup>6</sup> Rejection of CPD's brief will not adversely affect the Court's ability to resolve the issues in this case. Four other briefs, on behalf of a total of nine separate *amici*, have been filed in support of Petitioner herein. *See also* Sup. Ct. R. 37.1

**ATTACHMENT**

## ATTACHMENT

Excerpt from Hartford Courant, February 3, 1985, A20:

*"Channel 18 Sale: Perfume, a Preacher,  
and a Whiff of Intrigue"*

\* \* \*

Hart [Thomas A. Hart, Jr.] . . . saw an opportunity for several moneyed clients of the firm [with which he was then associated]. One was the Astroline Corp., a big oil wholesaler based in Saugus, Mass. . . .

\* \* \*

. . . Hart began negotiating directly with Faith Center [the then-licensee of Channel 18] on behalf of Astroline. But even if they could work out a price for Channel 18, a key piece of the puzzle was still needed - a minority partner so they could comply with the FCC's distress sale rule.

Hart already had someone in mind. Several months earlier, an old friend in the radio business in Boston introduced him to [Richard] Ramirez.

\* \* \*

. . . While Channel 18 wasn't discussed at first, Hart recalled, "I kind of stashed Rich away as a potential participant in the Hartford deal."

The Astroline Communications Co. - the product of the arranged marriage between Ramirez and Astroline Corp. - was born last May 29 [1984].

MAR 6 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

(19)  
No. 89-700

**In the Supreme Court of the United States**

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Respondent.*

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR RESPONDENT  
SHURBERG BROADCASTING OF HARTFORD**

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MARCH 6, 1990

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## PARTIES TO THE PROCEEDING

Alan Shurberg, a life-long resident of Hartford, Connecticut, was the sole principal of Shurberg Broadcasting of Hartford, Inc. That corporation applied to the Federal Communications Commission ("FCC") in 1983 for authority to construct a broadcast station on Channel 18 in Hartford and initially prosecuted the appeal arising from the FCC's action relative to that application. Mr. Shurberg has, since February, 1989 and pursuant to the FCC's rules, prosecuted the application and the appeal as a sole proprietorship, *i.e.*, Alan Shurberg d/b/a Shurberg Broadcasting of Hartford. Mr. Shurberg, his sole proprietorship, and his corporation are referred to collectively as "Shurberg" herein.

Petitioner Astroline Communications Company Limited Partnership Debtor-in-Possession is a Massachusetts Limited Partnership which has been in Chapter 11 bankruptcy proceedings in United States Bankruptcy Court for the District of Connecticut (Case No. 2-88-01124) since December, 1988.

The Federal Communications Commission is an independent agency charged with regulating the radio airwaves in the United States.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

No. 89-700

ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP, PETITIONER,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,  
RESPONDENT

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT  
SHURBERG BROADCASTING OF HARTFORD

**COUNTERSTATEMENT OF THE CASE**

This case involves the Minority Distress Sale Policy of the Federal Communications Commission ("FCC") both on its face and as it was applied below to bar consideration of the application of Respondent Shurberg Broadcasting of Hartford ("Shurberg") for a construction permit for a television station in Hartford, Connecticut.<sup>1</sup>

<sup>1</sup> References to the Appendix to the Petition for Certiorari are denoted "Pet. App. \_\_\_\_". References to the Joint Appendix are denoted "J.A. \_\_\_\_". References to materials being lodged with the Court by Shurberg simultaneously with the filing of this Brief are denoted "Resp. Supp. \_\_\_\_".

### 1. The Minority Distress Sale Policy

The Minority Distress Sale Policy ("Policy") was first adopted in 1978. The FCC, acting *sua sponte*,<sup>2</sup> announced that it believed that an increase in minority ownership of broadcast licenses would "inevitably" increase the diversity of programming available to broadcast audiences. *1978 Policy Statement*, 68 F.C.C.2d at 981.<sup>3</sup> Although it stated and re-stated this "inevitability" notion several different ways, the FCC neither articulated nor cited any empirical basis for its belief that program diversity was dependent on race *qua* race. The central issue before the Court is whether this unsupported assumption of the FCC can validate an exclusionary, race-based governmental classification. See *Petition for Certiorari of Astroline Communications Company Limited Partnership ("Astroline")* at *i*; but see n. 20, *infra*.

Despite the lack of any demonstrated foundation, the FCC

<sup>2</sup> *Amici Congressional Black Caucus et al.* (collectively, "CBC") incorrectly suggest that the Policy was the result of some "rulemaking" proceeding. CBC Brief at 2. The FCC did *not* undertake any "rulemaking" as defined in 5 U.S.C. §553: no notice of proposed rulemaking was issued, no public comments were solicited on any particular proposals and no report and order was issued. Instead, the FCC simply issued a "Policy Statement" setting forth the Policy. *Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978) (hereinafter "*1978 Policy Statement*"). While that Statement contains one passing reference to a petition for rulemaking filed by the Congressional Black Caucus, the context of that reference indicates that the FCC believed the Policy Statement to be a rejection of that petition. *Id.* at 983.

<sup>3</sup> The FCC had historically rejected the notion that the race or ethnicity of a broadcast licensee should be considered at all as a factor in the broadcast licensing process, much less that minority ownership would "inevitably" lead to program diversity. See *TV9, Inc. v. FCC*, 495 F.2d 929, 936 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974). However, in 1973, the United States Court of Appeals for the District of Columbia Circuit held that the FCC was required to consider minority ownership to the extent that it "is likely to increase diversity of [programming] content." *Id.* at 937-938.

created the Policy and one other policy, both supposedly intended to achieve program diversity through minority ownership of broadcast stations. See generally, *1978 Policy Statement*.<sup>4</sup> Under the Policy, incumbent licensees about which basic qualifications questions had been raised were permitted to avoid the revocation or license renewal hearing which would otherwise have been necessary, so long as the incumbent licensee elected to sell its station to a "minority buyer" at a "distress sale price". *1978 Policy Statement*, 68 F.C.C.2d at 983. Later in 1978, the FCC emphasized that the Policy would not be available when a competing application was pending for the incumbent licensee's station.<sup>5</sup> *Clarification of Distress Sale*

<sup>4</sup> The other minority ownership policy adopted in 1978 was the "minority tax certificate policy", under which the FCC grants tax certificates, pursuant to 26 U.S.C. §1071, to non-minority broadcast licensees who sell their stations to minority buyers. The tax certificate permits the seller to defer taxation of the proceeds of the sale. While the tax certificate policy has not been directly challenged in this or any other case, that policy is closely tied in origin, design and rationale, to the Minority Distress Sale Policy. A determination that the latter is unconstitutional would likely be fatal to the former. The Court need not reach this particular question in this case, however.

In addition to the minority tax certificate policy, the FCC has also implemented a "minority preference policy" as part of the comparative broadcast licensing process. Pursuant to the minority preference policy, the FCC gives enhanced comparative credit to applicants for new broadcast construction permits to the extent that such applicants include among their voting principals minorities who commit to be involved in the day-to-day management of the proposed station. The constitutionality of the minority preference policy is at issue in *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *cert. granted sub nom. Metro Broadcasting, Inc. v. FCC*, 58 U.S.L.W. 3427 (January 8, 1990)(No. 89-453).

The minority distress sale, tax certificate and preference policies are sometimes referred to collectively herein as "the minority ownership policies."

<sup>5</sup> The Communications Act, the FCC's Rules and a well-established line of cases provide for the "comparative renewal" procedure pursuant to which an applicant, such as Shurberg, may periodically file an application for a new broadcast authorization specifying the facilities of an existing station. See, e.g., 47 U.S.C. §309(e); 47 C.F.R. §73.3516(e); *New South Media Corp. v. FCC*, 685 (continued...)

Policy, 44 Rad. Reg. 2d (P&F) 479, 480 n.3 (1978). By denying "distress sale relief" in situations involving comparative renewals, the FCC effectively indicated that the public interest benefits flowing from the comparative renewal process override those flowing from the Policy. *Id.*

By its terms, the Policy is available only when the license in question is being transferred or assigned to a "minority" applicant. The term "minority" was originally defined as including "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." 1978 Policy Statement, 68 F.C.C.2d at 980 n.8. <sup>6</sup> It was redefined in 1982 to include "American Indians or Alaskan Natives, Asians and Pacific Islanders, Blacks and Hispanics". Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849 n.1 (1982) ("1982 Policy Statement"). The redefinition did not eliminate the practical difficulty of defining any of the particular racial or ethnic terms. <sup>7</sup>

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<sup>5</sup>(...continued)

F.2d 708 (D.C. Cir. 1982); *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979), on appeal of remand, 683 F.2d 503 (1982), cert. denied, 460 U.S. 1084 (1983). This procedure arises from the Court's decision in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). Shurberg filed its application pursuant to this well-established authority.

<sup>6</sup> The FCC did not indicate what level of racial or ethnic "extraction" was necessary before an individual could take advantage of the Policy. Compare *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (Stevens, J., dissenting) (citing First Regulation to the Reichs Citizenship Law of November 14, 1935) with *Storer Broadcasting Co.*, 87 F.C.C.2d 190 (1981) (FCC traces applicant's family history to 1492 to conclude that applicant named "Liberman" is "Hispanic" for purposes of minority tax certificate policy).

<sup>7</sup> For example, the FCC did not define "Hispanic". Webster's New Collegiate Dictionary defines that term as relating to "Spain, Spain and Portugal, or Latin America". Webster's New Collegiate Dictionary, 542 (1975). It appears, however, that Portuguese persons are not "minorities" in the FCC's view, even though they are geographically (if not linguistically and culturally) akin to  
(continued...)

## 2. The History of This Proceeding

On December 2, 1983, Shurberg -- whose sole principal is Alan Shurberg, a white male -- filed an application seeking a construction permit for a new television station utilizing the facilities of Station WHCT-TV, Channel 18, Hartford, Connecticut ("Station"). Shurberg's application was filed pursuant to the well-established, statutorily-mandated comparative renewal procedure. See n.5, *supra*. Faith Center, Inc. ("Faith Center"), then-licensee of the Station, had previously been designated for a revocation proceeding, but had elected to invoke the Policy. *Faith Center, Inc.*, FCC 80-680 (released Dec. 1, 1980). In September, 1983, the FCC had granted Faith Center "minority distress sale" relief and had terminated the revocation proceeding. *Faith Center, Inc.*, 54 Rad. Reg. 2d (P&F) 1286 (1983). On December 1, 1983, the "window" opened for the filing of competing applications for Connecticut broadcast stations. 47 C.F.R. §§73.3516, 73.1020. <sup>8</sup>

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<sup>7</sup>(...continued)

Spanish persons. See *Capital City Community Interests, Inc.*, FCC 86D-44 (Initial Decision) at 59 (released July 6, 1986) ("Portuguese descent is not the same as Hispanic, and persons of Portuguese descent are not entitled to any minority enhancement credit"). Resp. Supp. at 2. The FCC has not indicated whether similar distinctions may be drawn between various "Hispanic" sub-groups (e.g., Spaniards, Cubans, Puerto Ricans, Mexicans), or why any of those sub-groups is necessarily to be preferred over other non-black ethnic minorities (e.g., Italians, Irish, Jews) who have historically suffered discrimination.

<sup>8</sup> See *Faith Center, Inc.*, 86 F.C.C.2d 891 (1981), where the FCC permitted competing applications with respect to another station held by Faith Center, notwithstanding Faith Center's request that it be allowed to sell that station to a minority-controlled applicant. In that case the competing applicants included entities "with significant minority representation", *id.* at 894, n.14. While the FCC, *Astroline et al.* may suggest various factual distinctions between that case and the instant one, the fact remains that, in 1981, faced with competing applicants "with significant minority representation" and a proposal to sell the subject station to a "minority-controlled" buyer, the FCC accorded to the interest in competing applications dispositive weight; by contrast, in the instant  
(continued...)

In March, 1984, Faith Center advised the FCC that the previously approved distress sale had not been consummated. Shurberg then pressed for the prompt designation of a comparative renewal hearing between Shurberg and Faith Center. The FCC took no action on Shurberg's request or on its application.

In June, 1984, some seven months *after* the filing of Shurberg's application, Faith Center sought to take advantage of the Policy again, this time proposing to sell the Station to Astroline. Shurberg opposed the Faith Center/Astroline request for distress sale relief, pointing out, *inter alia*: that the pendency of Shurberg's application rendered distress sale relief unavailable; that Astroline was not a "minority-controlled" entity;<sup>9</sup>

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<sup>8</sup>(...continued)

case where the primary factual distinction appears to be that Shurber is not "minority-controlled", the FCC's scales fell on the side of the "distress sale" applicant. See Pet. App. 121a (FCC notes that conflict between competing applications and proposed minority distress sale is a "close question"). This suggests that the FCC's decision below in this case might have been different had Shurberg claimed to be minority-controlled.

<sup>9</sup> The showing offered to the FCC by Astroline in support of its claim of "minority control" is included at J.A. 7-9. Contrary to that limited, self-serving, conclusory showing, Shurberg demonstrated to the FCC that, by Astroline's own admission, the sole minority principal of Astroline (and its purported controlling general partner), Richard Ramirez -- a non-black person described by Astroline as a "Hispanic-American", J.A. 7 -- had contributed a total of \$210 in cash for his interest in Astroline. J.A. 68-69. As the Astroline partnership agreement did not provide for non-cash capital contributions, Mr. Ramirez' \$210 contribution was the only consideration he provided, in return for which he supposedly acquired 21% of the company's overall equity and 70% of its voting equity. J.A. 8. The remainder of Astroline's \$10 million in financing (including the Station's \$3.1 million purchase price) was to be provided by Astroline's non-minority principals. J.A. 11. According to information Astroline submitted to the FCC in December, 1988, as of that date Astroline's non-minority principals had made capital contributions amounting to approximately \$24 million (\$24,000,000.00); also as of that date, Mr. Ramirez' contribution remained unchanged at \$210. See Resp. Supp. at 15.

and that, in any event, the Policy impermissibly discriminated against non-minorities such as Shurberg.

The FCC rejected Shurberg's arguments, concluding instead that the FCC's minority ownership policies were "sufficiently important" to outweigh Shurberg's interest in securing comparative consideration of its application. *Faith Center, Inc.*, 99 F.C.C.2d 1164 (1984), Pet. App. 121a. Shurberg appealed that decision immediately.

In its May, 1985 brief and January, 1986 oral argument to the Court of Appeals below, the FCC defended the Policy. However, in September, 1986, while the case was pending before the Court of Appeals, the FCC filed a brief with the Court of Appeals *en banc* in the unrelated case of *Steele v. FCC*, No. 84-1176 (D.C. Cir.) (filed Sept. 12, 1986) ("*Steele Brief*"). Resp. Supp. at 16. In its *Steele Brief*, the FCC advised the Court of Appeals that the FCC had concluded that the minority preferences policy was unconstitutional for lack of an adequate supporting record. According to the FCC,

to the extent that racial and gender preferences may be viewed as a remedy for discrimination, there is no evidence of past discrimination in licensing by the FCC. . . . [And] no record has been established on which to base an assumption that a nexus exists between an owner's race or gender and program diversity.

*Steele Brief* at 14, 19.<sup>10</sup>

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<sup>10</sup> Before this Court, the FCC has returned to its 1985 position that the minority ownership policies are constitutional. Understandably, the FCC declines to detail in its Brief the "now we see it, now we don't" approach the FCC has taken toward the constitutionality of those policies. As discussed in the text above, since 1973 the FCC has turned 540° on that question: in *TV9*, 495 F.2d at 936, the FCC argued that such policies were contrary to the color-blind principle of the Constitution because program diversity was *not* invariably a (continued...)

The panel hearing the instant case thereupon ordered, *sua sponte*, the FCC to explain the impact of its position in *Steele* on the constitutionality of the Policy. J.A. 21. The FCC declined to do so, and instead sought remand of the case for further consideration of the constitutional question. J.A. 45. Shurberg and Astroline both opposed any such remand.

While the panel below considered the FCC's remand request, the Court of Appeals *en banc* remanded *Steele*. See J.A. 49. The FCC then issued a Notice of Inquiry. *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986), J.A. 48, modified, 2 FCC Rcd 2377 (1987) ("*Steele Inquiry*"). There the FCC indicated a belief that not only the minority preference policy, but also the Minority Distress Sale and Tax Certificate policies, lacked necessary constitutional support. J.A. 56.

In January, 1987, the panel below remanded this case for 90 days "to permit the FCC to resolve its position with respect to the [Station's] license". J.A. 67. After reviewing further comments by Shurberg, Astroline and Faith Center, the FCC reported to the Court of Appeals that

[t]o the extent that the distress sale policy . . . relies on assumptions that minority ownership will result in increased program diversity, the Commission has . . . concerns as to the constitutionality of the distress sale policy. <sup>(\*)</sup>

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<sup>10</sup>(...continued)

result of minority ownership; five years later, the FCC took the opposite tack in the 1978 *Policy Statement*; in 1986, the FCC reversed itself again in its *Steele Brief*, *supra*, returning largely to its 1973 position; in 1988, in response to direct pressure from Congress, the FCC reversed itself yet again. The Court may well question the steadfastness and reliability of the FCC's present position, as well as the deference, if any, to which that position might be entitled.

[Footnote:] Indeed, it could be argued that the distress sale policy presents more difficult questions than comparative preferences. Unlike comparative proceedings where the minority preference is only one of a number of potential comparative considerations, the minority distress sale policy is available *only* to minorities or minority-controlled applicants. Moreover, the comparative preference is available only where the minority owner will be integrated into the proposed station's daily operations. No such requirement exists in the case of distress sales, and the minority owner thus may have no regular involvement in programming decisions or effect on programming diversity.

J.A. 78 (emphasis in original). Despite this apparent concession of the correctness of the position which Shurberg had been advancing for some three years already at that point, the FCC then asked the Court of Appeals again to remand this case permanently for still further agency consideration in connection with the *Steele Inquiry*. In June, 1987, the Court of Appeals (with Judge Silberman dissenting) remanded the record of the case to the FCC, subject to certain conditions. <sup>11</sup>

According to a published news report, Astroline then undertook a major lobbying effort directed to Congress. *Legal Times*, Jan. 18, 1988, at 7, col. 1, J.A. 85. Its purpose appears to have been to secure passage, in the context of appropriations legislation, of a legislative provision designed to protect

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<sup>11</sup> The June, 1987 remand order, and Judge Silberman's dissent, appear at J.A. 81-84. The conditions in that order relating to Astroline's entitlement to any "renewal expectancy" were based on representations which had been made to the Court of Appeals by Astroline and the FCC in response to a motion for stay filed by Shurberg in 1984. The relevant portions of the Astroline and FCC pleadings are included at J.A. 13-17. Demonstrating its apparent determination to support Astroline to Shurberg's detriment, the FCC performed a stunning *volte face* with respect to the extent to which Astroline might rely, in the FCC's view, on the grant of the distress sale application pending completion of judicial review. Compare J.A. 14-15 with J.A. 79-80.

Astroline's interests against any adverse decision which the FCC or the Court of Appeals might otherwise reach. The result of Astroline's efforts appeared in the Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987) ("1987 Appropriations Act"), directing the FCC to end the *Steele Inquiry* and to reaffirm the grant of the Faith Center/Astroline distress sale.<sup>12</sup>

Pursuant to the 1987 Appropriations Act, the FCC abruptly terminated the *Steele Inquiry* and reaffirmed its earlier decision in this case. *Faith Center, Inc.*, 3 FCC Rcd 868 (1988). Since the Court of Appeals had remanded the record of the case to permit the FCC to consider, in the *Steele Inquiry*, whether any record might be compiled in support of the constitutionality of the Policy, and since Congress' action had precluded the compilation of any such record, it was clear that no further purpose would be achieved by the remand. At Shurberg's request, and over Astroline's opposition, the Court of Appeals

<sup>12</sup> The particular language of the 1987 Appropriations Act, which related to the FCC's annual appropriation, was:

[N]one of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue examination of, the policies of the [FCC] with respect to comparative licensing, distress sales, and tax certificates . . . , to expand minority and women ownership of broadcast licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended . . . which were effective prior to September 12, 1986, other than to close [the *Steele Inquiry*] with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

101 Stat. 1329-31. Identical language has been included in appropriations riders in each of the two years since. Pub.L.No. 100-459, 102 Stat. 2186 (1988), Pet. App. 163a; Pub.L.No. 101-162, 103 Stat. 1020-21 (1989), Appendix to Astroline Br. The Senate Report accompanying the 1987 Appropriations Act instructed that the agency's grant of the Faith Center/Astroline distress sale be affirmed. S. Rep. No. 182, 100th Cong., 1st Sess. (1987) ("1987 Senate Report") at 77.

withdrew its remand.

In November, 1988, while the case was still *sub judice*, Astroline was placed in involuntary bankruptcy, which Astroline ultimately converted to voluntary status, with Astroline appointed as "debtor-in-possession". To date Astroline remains in that status.<sup>13</sup>

On March 31, 1989, the Court of Appeals issued its decision. Pet. App. 1a. The *per curiam* opinion of the Court reflected the conclusion of Judges Silberman and MacKinnon that the Policy is unconstitutional. The opinion did not provide the FCC with any specific guidance regarding the nature of the proceedings to be undertaken on remand. But both Judges Silberman and MacKinnon clearly recognized in their respective opinions

<sup>13</sup> Astroline's "debtor-in-possession" status appears to undermine any claim that Astroline might otherwise have to being a "minority-controlled" company. As a "debtor-in-possession", Astroline is subject to trustee-like responsibilities not necessarily consistent with the near-total discretion which the FCC's notion of "minority control" presupposes. See 11 U.S.C. §§1106, 1107(a).

The bankruptcy raises further questions about Astroline's claim of "minority control". The record in Astroline's bankruptcy proceeding indicates that, in the course of depositions conducted by counsel for the Creditors' Committee, it was disclosed that the Station's operations had consistently been directed not by Mr. Ramirez in Hartford, but by representatives of Astroline's nonminority principals in Boston. Since Shurberg is not a party to the bankruptcy proceeding, Shurberg does not have full access to all information which may have been developed on this point (although Shurberg understands that Mr. Ramirez is no longer involved in any way with the Station's day-to-day management and no longer resides in Connecticut). Shurberg advised the Senate Telecommunications Subcommittee about the information which had come to its attention as of September, 1989. *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation* (Comm. Print Sept. 15, 1989) at 175-176 ("1989 Senate Subcommittee Hearing"). Because Astroline's consistent position since the beginning of this case has been that Astroline is "minority-controlled", a demonstration that it has not been "minority-controlled" would not only gut its arguments, but also indicate that Astroline has advanced fraudulent claims to the FCC, the Court of Appeals and this Court.

Shurberg's right to compete in a comparative proceeding against Faith Center, a licensee of dubious qualifications. See Pet. App. 34a-35a, 66a-67a.

Petitions for rehearing and suggestions for rehearing *en banc* were denied. Pet. App. 143a, 155a. The FCC requested and was granted two extensions of time within which to advise this Court of the FCC's position on *certiorari*. The FCC ultimately elected not to seek *certiorari*. Astroline, however, did seek review by this Court. The FCC did not support Astroline in that regard; to the contrary, the FCC opposed Astroline's petition. The Court granted *certiorari* on January 8, 1990.

### SUMMARY OF ARGUMENT

The Constitution is color-blind: any governmental classification based on race or ethnicity is inherently suspect and must be subject to the strictest possible judicial scrutiny. Such scrutiny entails a two-step analysis. First, the classification must be directed to a "compelling" interest. Second, the classification must be "narrowly tailored" to address the "compelling" interest to which it is supposedly directed. The Policy fails both elements of this strict scrutiny analysis.

The Policy is said to be directed to two distinct "compelling interests": the correction of "underrepresentation" of "minorities" in the ownership of broadcast stations, and the advancement of "program diversity". Neither of these is sufficient to pass constitutional muster.

The remediation of past discrimination may justify some race-based governmental actions, but only when the underlying discrimination has been the subject of formal findings by a competent forum. Here there are no such findings by any forum and, indeed, the agency which created the Policy has expressly and repeatedly denied both that any discrimination has occurred and that the Policy was intended to remedy any discrimination.

Even if the Policy were deemed, *arguendo*, to be properly directed to the remediation of discrimination, the Policy is not narrowly tailored toward that goal in any rational sense. The benefits of the Policy are available to all "minorities" *regardless* of whether they have been victims of *any* discrimination, much less discrimination in connection with the broadcast licensing process. The Policy is limitless in duration and potentially affects every broadcast license issued by the FCC. In this particular case, the Policy has deprived Shurberg of a substantial opportunity to compete for a valuable television license.

The promotion of program diversity is not a "compelling interest" sufficient to justify race-based classifications. While the free flow of ideas is desirable, that free flow should be achieved *without* content-based governmental regulation. The Policy is clearly and objectionably "content-related", as it is based on the unsupported, racist assumption that, in the quest for program diversity, the content of programming which would be provided by *any* "minority" licensee would be substantively preferable to, or even different from, that which *any non-minority* would provide. Moreover, race-neutral, content-neutral measures have promoted program diversity so effectively that the FCC has abandoned several of those measures because they are no longer necessary.

Even if "program diversity" were a "compelling interest", the Policy is not at all narrowly tailored toward that interest. Neither the FCC nor any of the Policy's supporters has sought to define the concepts of "minority programming" and "minority viewpoint", even though such definitions are essential to assure the proper "narrow tailoring". The Policy requires only that a distress sale applicant allege that it is "minority-controlled"; the Policy imposes no program-related requirements, and it does not even require that the supposedly controlling minority person(s) be involved in any way with the station's programming. The FCC undertakes no *post hoc* monitoring to determine whether, in fact, program diversity is being increased.

The fact that Congress has referred to the FCC's minority ownership policies in certain appropriations riders does not alter the strict scrutiny analysis. Congress' actions fall short of codification of the Policy. Further, it would be inconsistent with Shurberg's due process rights and basic notions of separation of powers to permit Congress to intrude into the on-going adjudication of a private action before an Article III court. But even if Congress is deemed to have properly enacted the Policy, that fact alone would not correct the Policy's multiple constitutional infirmities: Congress has, at most, merely rubber-stamped the FCC's Policy, without attempting either to develop a supporting record for, or to narrowly focus, the Policy.

### ARGUMENT

Petitioner, the FCC and various *amici* contend that the FCC's Policy is consistent with the constitutional guarantee of equal protection. That contention is wrong: in view of the very terms of the FCC's policy (as well as its history), the Policy is plainly unconstitutional.

#### **I. Race-Based Governmental Policies Can Be Sustained Only If They Are Narrowly Tailored To Achieve A Compelling Interest Which Is Either Clearly And Particularly Remedial In Nature Or Necessary To Address A Clear And Present Threat To The Public Welfare.**

##### **A. The Minority Distress Sale Policy Is An Exclusionary, Race-Based Governmental Classification Subject To "Strict Scrutiny" Analysis By The Court.**

The FCC's Policy is available *only* to individuals belonging to certain specified minority groups or to entities (e.g., partnerships or corporations) "controlled" by such individuals; stated another way, all *non-minority* applicants are absolutely excluded from the beneficial reach of the policy.<sup>14</sup> In this case, application

<sup>14</sup> See nn.6, 7, *supra*, and accompanying text for a list of the "minority" groups (continued...)

of that Policy directly and exclusively resulted in Shurberg's rejection by the FCC. *Faith Center, Inc.*, *supra*, Pet. App. 121a-122a. As a result, the policy is inconsistent, on its face and as applied to Shurberg, with the fundamental constitutional principle of equal protection which guarantees, to each individual, governmental decision-making unaffected by such suspect factors as skin color and national origin. See *City of Richmond v. Croson*, 109 S.Ct. 706, 727 (1989); *Brown v. Board of Educ.*, 347 U.S. 483, 493-95 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)(Harlan, J., dissenting)("Our Constitution is color-blind"). The Policy is therefore highly suspect. See, e.g., *Croson*, 109 S.Ct. at 721 (O'Connor, J.); *Loving v. Virginia*, 388 U.S. 1 (1967).

The presumptive invalidity of any such suspect governmental classification may be overcome if it can pass muster under the "strict scrutiny" standard of judicial review. E.g., *Croson*, 109 S.Ct. at 721 (O'Connor, J.)<sup>15</sup>; *Loving*, 388 U.S. at 11 (1967).

<sup>14</sup>(...continued)  
eligible to take advantage of the Policy.

<sup>15</sup> The Chief Justice and Justices White and Kennedy joined in that portion of Justice O'Connor's opinion in *Croson* in which the "strict scrutiny" analysis was expressly articulated. Justice Scalia also expressly concurred on that point. 109 S.Ct. at 735 (Scalia, J., concurring in the judgment).

Justice Stevens has not expressly endorsed a specific articulation of the "strict scrutiny" analysis. He has, however, indicated that courts have a "special obligation to scrutinize" legislative activity leading to classifications based on race. See *Fullilove*, 448 U.S. at 548 (Stevens, J., dissenting).

Justices Brennan, Marshall and Blackmun have stated that, in their view, remedial use of race is permissible "if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives.'" *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 301-02 (1986)(Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.). While this standard is significantly more relaxed than the "strict scrutiny" which has been endorsed by at least five members of the Court, the Policy is so wholly unconnected to any arguable "important objective" that it fails to pass even that relaxed test. See (continued...)

That standard requires that the classification's proponent demonstrate that the policy is "narrowly tailored" to the accomplishment of a "compelling" governmental purpose. *E.g.*, *Wygant*, 476 U.S. at 273-74 (Powell, J.); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).<sup>16</sup> In the instant case, the Policy is not directed to any such governmental purpose. Further, even if that policy were deemed *arguendo* to satisfy the first phase of strict scrutiny analysis, it clearly fails to satisfy the second.

*B. The "Compelling Interest" Supposedly Legitimizing A Racial Classification Must Be Either Clearly And Particularly Remedial Or Necessary To Address A Clear And Present Threat To The Public Welfare.*

Before strict scrutiny can be undertaken, it is necessary to identify what types of interest are sufficiently "compelling" to justify an otherwise obvious violation of the Constitution. Mere assertions of authority under, *e.g.*, the Commerce Clause or the Spending Clause are unavailing for this purpose, because the guarantee of equal protection is itself a condition on those other

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<sup>15</sup>(...continued)  
*infra* at 27-33, 38-43.

<sup>16</sup> The two-prong strict scrutiny analysis applies equally to both state and federal actions. *Buckley v. Valeo*, 424 U.S. 1, 93-94 (1976). The constitutional guarantee of equal protection is, after all, personal in nature, assuring to each individual citizen equal treatment at the hands of the government, whether that government is local or national. *See Bolling v. Sharpe*, 347 U.S. 497 (1954); *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."). The identity of the governmental entity may affect the ultimate resolution of the equal protection question, since some interests which may be "compelling" for one governmental body may not be equally so for another. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). *See also Croson*, 109 S.Ct. at 719 (O'Connor, J.). Nevertheless, the analytical elements themselves are applicable irrespective of the governmental entity in question.

sources of Constitutional power. That is, Congress has broad authority to act pursuant to its Article I powers *as long as* such action is consistent with the guarantee of equal protection. *See Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (Black, J.) ("every provision of the Constitution [,] was expressly qualified by the Civil War Amendments' ban on racial discrimination"); *cf. Mississippi University for Women v. Hogan*, 458 U.S. 718, 732-33 (1982) ("neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment"); *Fullilove*, 448 U.S. at 548 (Stevens, J., dissenting) ("the exercise of [Congress'] broad [Article I] powers is subject to the constraints imposed by the . . . Fifth Amendment"). To hold that Congress could ignore the requirement of equal protection simply by asserting authority under the Commerce or Spending Clause would render the concept of equal protection a nullity.

Section 5 of the Fourteenth Amendment does provide Congress with additional authority specifically to enforce the protections of that Amendment through some types of remedial race-based programs. *E.g.*, *Fullilove*, 448 U.S. at 476-77 (Burger, C.J.). That authority, however, authorizes Congress only to enforce Section 1 of the Amendment, which governs only *State* conduct. No State action is or could be involved here: broadcast licensing has invariably been deemed a matter under Federal control in which the States have no role. *See the Communications Act of 1934*, 47 U.S.C. §§151 *et seq.*; *Radio Act of 1927*, 44 Stat. 1162. Thus, it is not at all clear that the supplemental Congressional authority embodied in Section 5 of the Fourteenth Amendment may properly be invoked with respect to broadcast licensing activities of the FCC.<sup>17</sup>

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<sup>17</sup> That this case arose from the FCC, a non-elected, independent Federal agency, has further impact on the factors which may appropriately be considered here. First, since no State legislative conduct at all is involved, the Federal action here is not entitled to deference flowing from considerations of Federalism. *See, e.g., Croson*, 109 S.Ct. at 735-36 (Scalia, J., concurring in the judgment).

(continued...)

But even if the Fourteenth Amendment does empower Congress to act with respect to the FCC, the resulting authority is not a boundless license to ignore the basic, color-blind principles underlying both the Fourteenth Amendment and the Constitution itself. Any governmental effort to "remedy" discrimination requires as a predicate the clear identification, in formal findings by a competent body, of the constitutional or statutory violations to which the "remedy" is directed.<sup>18</sup> See

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<sup>17</sup>(...continued)

Similarly, the non-legislative character of the Policy renders irrelevant any notion that "discrete and insular minorities" may warrant greater protection in the legislative process. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). Some amici argue that that notion may be extended to justify different standards of judicial review based on the race or ethnicity of the party involved. Brief of National Bar Association ("NBA") at 26-27; Brief of Amici American Civil Liberties Union *et al.* (collectively, "ACLU") at 18-19. Such an extension was rejected by the plurality in *Croson*, 109 S.Ct. at 721-22 (O'Connor, J., joined by Rehnquist, C.J. and White and Kennedy, JJ.), quoting *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 289-90 (Powell, J.) ("[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color"). See also *Craig v. Boren*, *supra*, 429 U.S. at 211-12 (Stevens, J.). But the Court need not reach this question here because the Policy at issue is the creation of a non-elected administrative agency. To the extent that the Policy might, *arguendo*, be deemed to have been "adopted" in some form by Congress, the *Croson* plurality's view would be apposite: the concept of equal protection is a limitation applicable *uniformly* to governmental conduct irrespective of the race or ethnicity of the parties before the Court.

Finally, the FCC's conclusions concerning the constitutionality of the Policy are entitled to no deference whatsoever, since the FCC has no expertise in the area of civil rights. Importantly, the Executive Branch office which *does* have such expertise – the Department of Justice – has concluded that the FCC's minority ownership policies are unconstitutional. See, e.g., Comments of Department of Justice submitted to the FCC on June 10, 1987 in the *Steele Inquiry*, Resp. Supp. at 47. A conclusion by the Executive Branch regarding a question of constitutionality is entitled to no less deference than might be accorded to a corresponding conclusion by the Legislative Branch.

<sup>18</sup> While Justice Scalia did not join in the majority opinion on this point in *Croson*, his concurring opinion there indicates that he, too, views the specific  
(continued...)

*Croson*, 109 S.Ct. at 724, citing *Wygant*, 476 U.S. at 274-75. An assertedly remedial racial classification can satisfy the required strict scrutiny analysis *only* if some record has been developed reflecting a prior history of unlawful discriminatory conduct, the effects of which are to be remedied.

No other interests which might be so "compelling" as to justify race-based classifications have been endorsed by the Court. Justice Powell suggested that an avowedly benign effort to assure "diversity" in a student body might be sufficient. *Bakke*, 438 U.S. at 311-12. See also *Croson*, 109 S.Ct. at 730-31 nn.1, 2 (Stevens, J., concurring). But that general view runs afoul of the color-blind nature of the Constitution in much the same way that *Plessy v. Ferguson*, *supra*, ran afoul of it: such benign efforts result *not* in the elimination, but in the *reinforcement*, of odious racial stereotypes and animosities. See *Fullilove*, 448 U.S. at 531 (Stewart, J., dissenting); *Croson*, 109 S.Ct. at 739 (Scalia, J., concurring in the judgment). Moreover, this ostensibly benign approach itself could and likely would itself lead to invidious discrimination.<sup>19</sup>

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<sup>18</sup>(...continued)

identification of discrimination as an essential predicate to any supposedly remedial legislative efforts. *Croson*, 109 S.Ct. at 738 (Scalia, J., concurring in the judgment).

See also Justice Powell's concurring opinions in *Fullilove*, 448 U.S. at 497-498 (Powell, J., concurring) ("[T]his Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations. . . . Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred.") and *Bakke*, 438 U.S. at 308-09 ("[w]ithout [judicial, legislative or administrative] findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. . . .") (footnote omitted). See also *Wygant*, 476 U.S. at 274-78 (plurality opinion of Powell, J.) and 295 (White, J., concurring in the judgment).

<sup>19</sup> For example, in order to achieve supposedly desirable "diversity" even in  
(continued...)

This is not to say that the government is *absolutely* prohibited from any non-remedial consideration of race and ethnicity. Even the clearest and seemingly most absolute Constitutional prohibitions have been held to be subject to safety valve exceptions necessary to protect against immediate threats to the public welfare. *E.g.*, *Korematsu v. United States*, 323 U.S. 214, 216, 220 (1944) ("pressing public necessity" involving "circumstances of direst emergency and peril" may justify race-based classifications). *See also Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) (exceptions to First Amendment permitted in face of "immediately dangerous" "emergenc[ies]"). Thus, for example, temporary racial segregation within a prison subject to racial tension may be acceptable. *Cf. Lee v. Washington*, 390 U.S. 333 (1968). Similarly, consideration of race in the selection of undercover police investigators may also be acceptable in some limited (and temporary) instances for the necessary advancement of the criminal justice system. *Cf. Croson*, 109 S.Ct. at 731 n.2 (Stevens, J., concurring). But apart from such extraordinary situations, and apart from the limited remedial situations discussed above, the government is constitutionally prohibited from acting on the basis of race or ethnicity. U.S. Const. amend. V, XIV.

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<sup>19</sup>(...continued)

academic environments, it might be necessary to *limit* certain ethnic groups (e.g., Asians) which, for one or another valid, non-discriminatory reason, had theretofore been successful in securing placement in such environments in greater numbers than other ethnic groups. After all, the notion that there exists a particular desirable level of "diversity" with respect to any finite or scarce universe (whether it is the universe of available places in a student body or available broadcast licenses) perforce means that, to achieve that desirable level, the scarce universe must be allocated according to a quota system which will necessarily exclude some to include others. *See Los Angeles Times*, Dec. 1, 1988, at 3, col. 1 ("Aide Sees Hints of Colleges' Asian Bias"). *See also Rohrabacher*, *The Heritage Lectures*, No. 216 (Sept. 19, 1989) (discussing H.Con.Res.147).

It is urged on this Court by Astroline, the FCC and various *amici* that two separate governmental interests underlie the Policy: first, the correction of "underrepresentation" of minorities in the ownership of broadcast facilities (e.g., *Astroline Br.* at 26 n.11; *FCC Br.* at 26-28), and second, the "advance[ment of] diversity" in programming by increasing minority ownership of broadcast stations (e.g., *Astroline Br.* at 19-20, *FCC Br.* at 34).<sup>20</sup> Neither of these supposed purposes can withstand the requisite strict scrutiny. Thus, the FCC's Policy is clearly unconstitutional.

## II. The Minority Distress Sale Policy Is Not Intended To Remedy Any Identified Discrimination And It Is Not, In Any Event, Narrowly Tailored To Effect Any Such Remedy.

### A. The Policy Is Not Directed To Any Identified Discrimination.

Astroline, the FCC and *Amici* ACLU and CBC assert that the Policy is a remedial effort directed to some "discrimination" which is said to account for the historical "underrepresentation" of minorities in the ownership ranks of the broadcasting industry. *E.g.*, *Astroline Br.* at 26 n.11; *FCC Br.* at 27-28. As discussed *supra* at 16-20, before they may be deemed to be

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<sup>20</sup> In its Petition for Certiorari, Astroline elected *not* to rely on any claim that the Policy may have been intended to remedy the effects of past discrimination. Rather, Astroline's "Question Presented" is whether that Policy may be sustained solely as an effort to promote diversity in programming. *Astroline Pet.* at i. Straying from the narrow course it itself charted in its Petition, Astroline discusses the supposedly remedial aspects of the Policy, *Br.* at 23-26. Similarly, *Amici* CBC and ACLU claim that the Policy may be constitutionally justified as a remedial measure. *CBC Br.* at 18-24; *ACLU Br.* at 8-10. While the Court did not grant *certiorari* on that particular question, Shurberg responds to it herein in order to demonstrate that the Policy *cannot* legitimately be viewed as a constitutionally acceptable remedial program. Shurberg notes that it has *never* been suggested by *anyone* that the Policy is necessitated by extraordinary circumstances involving clear and imminent danger to the public welfare.

directed to a "compelling interest", supposedly remedial, race-based, governmental actions must, as a necessary predicate, be supported by some formal finding of actionable discrimination. The history of the Policy reveals no such finding by the FCC, Congress or any court. Indeed, *any* assertion of the supposedly remedial purpose of the Policy is directly contradicted by the FCC's own statements.

In adopting the Policy in 1978, the FCC made clear that the policy was intended simply to promote diversity of program content. *1978 Policy Statement*, 68 F.C.C.2d at 981. No mention at all was made of "discrimination" of any sort, and it was not suggested that the policy was intended to remedy the effects of *any* discrimination. At most, the FCC expressed concern about an apparent "lack of minority representation in the ownership of broadcast properties". *Id.* The FCC did not ascribe that perceived "lack" to any particular source, discriminatory or otherwise.<sup>21</sup>

Consistently, the FCC advised the court below that the FCC's "primary goal [of the Policy] is *not* to remedy past discrimination." Brief for FCC at 30, *Shurberg Broadcasting of Hartford, Inc. v. FCC*, (D.C. Cir. No. 84-1600, filed May 15, 1985)(emphasis added). In fact, the FCC has disclaimed, expressly and unequivocally, any discrimination in the licensing processes of that agency. *Steele Brief* at 17-18 ("There has never been a finding, nor so far as we know even an allegation, that

<sup>21</sup> In fact, the FCC has identified the lack of financial opportunities as the main obstacle to increased minority participation in broadcast ownership. *Strategies for Advancing Minority Ownership in Telecommunications, Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications* (1982). See also *Minority-Owned Broadcast Stations: Hearing on H.R. 5373* Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess., 67 ("1986 House Subcommittee Hearing") (then-Chairman Fowler testifying that "number one, two and three problems [inhibiting increased minority ownership] are money, money, money.").

the FCC engaged in prior discrimination against racial minorities [sic] or women in its licensing process."). Moreover, *no* identified discrimination by *any* individual or entity (governmental or otherwise) has been formally alleged to which the statistical "underrepresentation" might be attributed. It is therefore clear that the Policy was neither designed nor implemented by the FCC to serve as a remedy for any identified past discrimination.

Citing limited language in a Conference Report accompanying certain 1982 amendments to the Communications Act of 1934, Astroline, the FCC and *amici* suggest that the FCC's minority ownership policies as a whole (including the Minority Distress Sale Policy) are remedial measures directed against some historical discrimination. See, e.g., Astroline Br. at 26 n.11; FCC Br. at 24, 27-31; CBC Br. at 18-24.<sup>22</sup> The 1982

<sup>22</sup> No examples of "discrimination", either incidental or systemic, are described in any of the briefs here. At most, it is suggested that societal discrimination may have prevented blacks from acquiring broadcast licenses in the earliest days of the industry, when the white-dominated ownership pattern is said to have been established. E.g., FCC Br. at 30-31; CBC Br. at 19-21. But this claim ignores the fact that there is substantial turnover of broadcast licenses -- approximately 9% of all broadcast licenses are sold in any given year (based on averages over the past 10 years). See *Broadcast/Mass Media Application Statistics*, FCC Ann. Rep. (Fiscal Years 1979-1988). Thus, even if the initial distribution of licenses were somehow improperly skewed, that distribution has been subject to substantial (if not near total) change over the course of the last 40-50 years. Any supposed pattern of discrimination would have had to have infected *not* just the initial distribution, but also the subsequent transfers of all licenses. Neither Astroline, nor the FCC, nor any *amici* allege any such universal infection. Nor could they: minorities have been involved in a significant number of such transactions. For example, one prominent black broadcaster has recently stated in a comparative licensing proceeding before an FCC ALJ that he has bought and sold some 50 broadcast stations since 1972. Declaration of Ragan A. Henry, Attachment to Opposition to Motion to Enlarge, submitted January 30, 1990 in MM Docket No. 88-429. See Resp. Supp. 90. See also n.48, *infra* (minority-owned company acquired two television stations and 11 radio stations since 1986). This hardly reflects rampant discrimination or non-availability of licenses to minorities.

A further flaw in the "remedial" claim is that it assumes that, if minorities  
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amendments did *not* involve the Minority Distress Sale Policy. Rather, they involved a "preference" scheme for the awarding of new licenses through a lottery procedure in which competing applicants would be entitled to certain "preferences" based on race and/or ethnicity. The policy then under consideration by Congress did *not* absolutely exclude non-minorities, as does the Minority Distress Sale Policy; instead, it provided for consideration of race as one of a number of comparative factors in the licensing process.<sup>23</sup> In fact, none of the 1982 legislative history contains *any* reference to the Policy. Since neither the design nor the implementation of the Policy was before the Conferees, expressly or by implication, the cited language is of questionable relevance to the instant case.

With respect to "discrimination", the Conferees said only that

the effects of past inequities stemming from racial and ethnic discrimination have resulted in severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the

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<sup>22</sup>(...continued)

had acquired stations 40 years ago, those minorities would have retained the stations or would have sold them only to other minorities. Both premises are equally improbable. See, e.g., *NEWSystems of Pennsylvania, Inc.*, 2 FCC Rcd 73 (1987)(two months after acquiring a station based on, *inter alia*, claimed benefits of minority ownership and program diversity, minority licensee sells the same station to non-minority buyer). See also n.49, *infra*.

Finally, claims of historical societal discrimination against blacks, even if true, do not explain why the FCC's policies are available equally to Hispanics (the purported minority group at issue in this case), Asians and Eskimos, or why they are not available to other groups (e.g., Irish, Italians, Jews) who may have suffered similar discrimination. See also n.7, *supra*.

<sup>23</sup> This is not to say that the Congressional language cited by *Amici* would be sufficient to support even the supposedly non-exclusionary comparative preference policies. As discussed above, the Conferees' cursory reference to "discrimination" does not provide an adequate basis for *any* race-based policy.

economy as well.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. at 43 ("1982 Conference Report"). The Conferees did not explain, in particular or in general, what those "past inequities" might have been, when they might have occurred, or who might have been responsible for them. In support of their blanket, conclusory assertion of underrepresentation, the Conferees cited only the raw percentages of radio and television broadcast licenses then held by minorities, without any reference to the number of qualified minorities interested in acquiring such licenses. *Id.* at 43-44.<sup>24</sup> But it cannot seriously be argued that 100% of the entire population of the United States (or 100% of any discrete "minority" portion thereof) is qualified to acquire, or interested in acquiring, a broadcast license. Thus, the Conferees' comparison of the percentage of "minority" broadcast owners with the percentage of "minorities" in the general population is the type of meaningless "apples and oranges" statistical comparison which has been specifically rejected by the Court. E.g., *Croson*, 109 S.Ct. at 725; *Hazlewood School Dist. v. United States*, 433 U.S. 299, 308 (1977).

In passing, the 1982 Conferees also cited generally to only three other sources: (1) the FCC's 1978 *Policy Statement* which (as noted above) contained no reference at all to discrimination; (2) a Report on Minority Ownership prepared by an FCC Taskforce, which referred only to general "societal discrimination", without more, as an apparent basis for the noted "underrepresentation"<sup>25</sup>; and (3) this Court's opinion in

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<sup>24</sup> In its Brief the FCC effectively confirms this observation: it refers to remarks by various members of Congress, *none* of whom mentions any statistical comparison other than percentage of minority-owned stations v. percentage of minorities in the general population. FCC Br. at 25 n.23.

<sup>25</sup> The Taskforce Report referred only to the term "general societal discrimination" when it addressed possible sources of the underrepresentation.  
(continued...)

*Fullilove* "and reports cited therein at 467 n.55". 1982 Conference Report at 44. *Fullilove*, of course, involved a set-aside program designed to benefit minorities in the construction industry; none of the various opinions in that case included any information about discrimination of any sort in the licensing of broadcast stations. The reports cited at Footnote 55 of Chief Justice Burger's opinion similarly included no information about any such discrimination. *Fullilove*, 448 U.S. at 467 n.55. <sup>26</sup> To argue that the 1982 Conference Report itself demonstrates that the Policy is remedial is thus nothing more than "bootstrapping": in support of their lone reference to "discrimination", the Conferees relied on sources which did not themselves identify any discrimination in the broadcast licensing process.

Thus, despite the *en passant* incantation of the term "discrimination" in one conference report eight years ago, there in fact is absolutely no judicial, legislative or administrative record of identified discrimination -- by the FCC or any other entity -- in the broadcast licensing process. <sup>27</sup> At most, the

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<sup>25</sup>(...continued)

FCC Minority Ownership Taskforce, Report on Minority Ownership in Broadcasting, 7-9 (1978). Notwithstanding the Taskforce's references to "societal discrimination", however, the FCC chose *not* to rely at all on "discrimination" of any type as a basis for the Minority Distress Sale Policy or the 1978 Policy Statement: as discussed in the text above, the FCC sought to justify the Policy *only* as an effort to increase program diversity. In this respect it is important to recognize -- as *Amicus* NABOB fails to do (see NABOB Br. at 20-22) -- that the Taskforce was an entity separate and distinct from, and subordinate to, the FCC.

<sup>26</sup> In fact, the reports cited by Chief Justice Burger reflect Congress' concern that set-aside programs be available *not only* to "minorities", but to *all* "socially and economically disadvantaged persons". E.g., S. Rep. No. 31, 95th Cong., 2d Sess. 107 (1979).

<sup>27</sup> Significantly, in Conference Reports pre-dating and post-dating the 1982 Conference Report relied on by Astroline and its supporters, there is no  
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record reflects a single Congressional reference to amorphous societal discrimination. But an "amorphous claim [of past discrimination] cannot justify the use of an unyielding racial quota" because such a claim "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy". *Croson*, 109 S.Ct. at 723. <sup>28</sup>

#### B. The Policy Is Not "Narrowly Tailored" To Remedy Any Supposed Discrimination.

Even if the remediation of some supposed non-specific discrimination might, *arguendo*, be deemed a "compelling" interest sufficient to survive the first hurdle of the strict scrutiny test, in order to survive the second hurdle the Policy would still have to be "narrowly tailored" to remedy that alleged discrimination. In assessing whether a remedy is narrowly tailored in this context, the Court has considered a number of factors: the necessity for the relief and the availability of other non-race-based alternative remedies; the relationship of the scope of the remedy vis-a-vis the number of potentially affected minorities in the relevant market; the effect of the remedy on

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<sup>27</sup>(...continued)

reference at all to "discrimination" of any sort. In 1981 Congress enacted an earlier version of the "lottery preference" system which was revised in the 1982 amendment. But the Conference Report accompanying the 1981 amendment makes no mention of "discrimination". H.R. Rep. No. 208, 97th Cong., 1st Sess. (1981) ("1981 Conference Report"). Similarly, in the Conference Report accompanying the 1987 Appropriations Act on which Astroline now relies, see Astroline Br. at 27-28, there is no mention of "discrimination" and no indication that Congress believed or intended the FCC's minority ownership policies to be "remedial" in any sense.

<sup>28</sup> See also *Wygant*, 476 U.S. at 274, 276 (plurality opinion of Powell, J.) ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification. . . . In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.")

third-parties; the stated duration of the remedy; and the availability of waiver provisions. *E.g.*, *Local 28 v. EEOC*, 478 U.S. 421, 475-81 (1986); *Fullilove*, *supra*. The Policy fails under each of these considerations.

1. *The Broad Sweep Of The Policy Is Clearly Not Necessary, Nor Even Rationally Related, To The Remediation Of Any Supposed Discrimination.*

As discussed above, in adopting the Policy, the FCC never purported to be attempting to remedy any discrimination. Because of this, the FCC cannot be said to have considered alternative possible remedies: if, as is apparent from its own statements, the FCC did not think that it was trying to remedy "discrimination", it could not be expected to consider other approaches more narrowly tailored for such a purpose.

It is clear in any event from the breathtaking scope of the Policy that it could not reasonably be construed as remedial in nature. The Policy is available not merely to minority individuals who are demonstrated victims of discrimination. Rather, the Policy is available across-the-board to *all* members of the particular racial or ethnic groups irrespective of, *inter alia*: whether they have been victims of *any* form of discrimination or related disadvantage (much less any "discrimination" in connection with the broadcast licensing process)<sup>29</sup>; whether they have previously taken advantage of the FCC's minority

<sup>29</sup> In this regard the Policy may be contrasted with the set-aside approved by the Court in *Fullilove*. Here, the FCC requires no showing that a distress sale applicant has been the victim of any discrimination, and, indeed, no such showing was made by Astroline (which described Mr. Ramirez merely as "a Hispanic-American", J.A. 7). In *Fullilove*, Chief Justice Burger emphasized that the legislative record underlying the set-aside in that case contained clear direction that that set-aside would be available *only* to "such minority individuals as are considered to be economically or socially disadvantaged". *Fullilove*, 448 U.S. at 471 (Burger, C.J.).

ownership policies; whether they are residents of (or have any connection at all with) the station's community of license; whether that community includes *any* significant population of *any* of the benefited minority groups; whether that community includes *any* representatives of the minority group to which the particular individual seeking to avail himself or herself of the Policy supposedly belongs. All of these factors underscore the Policy's substantial lack of "remedial" characteristics.

But there is more. The Policy is available not only to individual members of the specified minority groups, but also to business entities said to be controlled by such individuals. *See, e.g.*, *1982 Policy Statement*. But with very limited exceptions (*e.g.*, sole proprietorships and the like), a business organization such as a partnership or corporation cannot legitimately be said to hold a uniquely *personal* attribute such as race or ethnicity, especially when eligibility for governmental programs and benefits depends on the supposed attribute. If a governmental policy is "remedial", then it should truly remedy those who have been victims; it should *not* serve as an incentive to subterfuge by which non-victims enjoy undeserved and inappropriate windfalls.

But even if some such attribution may be justifiable based on the race of the entity's "controlling" principal, the FCC's standards for determining whether "control" exists are not designed to assure that the minority individual is in fact in control. The instant case demonstrates this. Although purportedly a minority-controlled limited partnership, Astroline's ownership structure belies that claim: according to the FCC's records, Astroline's supposedly "controlling" minority individual, who is now said by Astroline to own 21% of Astroline's overall equity and 100% of its voting control, acquired that interest for a total capital contribution of \$210 (two hundred and ten dollars); by contrast, the non-minority principals of Astroline acquired their partnership interests by capital contributions amounting in the aggregate to more than \$24 million (\$24,000,000.00). J.A. 7-8, 68-69; Resp. Supp. 3-15. That is, non-

minorities have contributed more than 99.999% of Astroline's capital.<sup>30</sup> See also n.13, *supra*.

To claim that Astroline is "minority-controlled" under these circumstances is clearly inconsistent with normal business practice, experience and expectations. Nevertheless, the FCC accepted Astroline's self-serving claims without further inquiry. The FCC thus demonstrated that the Policy, far from remedying any identifiable discrimination, in fact operates to permit non-minorities to form "front" or "sham" entities nominally controlled by minorities, but in fact controlled by those *non*-minorities seeking to enrich themselves through the FCC's minority ownership policies.<sup>31</sup>

<sup>30</sup> The disparity in actual contributions is particularly striking because it is inconsistent with Congress' own understanding of what constitutes a minority applicant. In the 1982 *Conference Report* relied on by Astroline, the FCC and *amici*, the Conferees specifically limited the reach of the minority preference plan there under consideration to entities "a majority of whose ownership interests are held by a member or members of a minority group." 1982 *Conference Report* at 44. The Conferees instructed the FCC to "evaluate ownership in terms of the beneficial owners of the corporation, or the partners in the case of a partnership." *Id.* at 45. They also twice defined "controlling interest" as constituting "over 50 percent." *Id.* at 43. Thus, whether Astroline's claimed ownership structure (*i.e.*, supposedly 21% minority ownership) or its beneficial structure (*i.e.*, 99.999% nonminority contributions, 0.001% minority contribution) is considered, it is clear that Astroline could not be deemed to be a minority applicant as Congress understood that term.

<sup>31</sup> Practically, the factors of profits and enrichment are important, if unstated, aspects of the minority ownership rules. One station purchased by a minority-controlled applicant pursuant to the Policy for approximately \$3.4 million in 1980 (*Broadcasting Service of America, Inc.*, 48 Rad. Reg. 2d (P&F) 456 (1980)) was sold in 1986 for approximately \$35 million. See Resp. Supp. 92-106. Another station (and an associated "satellite" station), purchased pursuant to the Policy in 1980 for \$3 million (*Grayson Enterprises, Inc.*, 77 F.C.C.2d 156 (1980)), was sold in 1985 for \$16.5 million. See Resp. Supp. 107-21. See also n.36, *infra* (describing minority tax certificate worth approximately \$100 million).

## 2. The Policy Is Virtually Unlimited In Scope And Duration And Contains No Provision For Waiver.

The universe of broadcast licenses potentially subject to the Policy is virtually unlimited: the FCC has the authority to designate each and every broadcast license for a revocation or renewal hearing, thus making *all* outstanding broadcast licenses subject to the Policy. See 47 U.S.C. §§307(c), 312.<sup>32</sup> This is a far cry from the extremely limited and well-defined minority set-aside approved by the Court in *Fullilove*. See *Fullilove*, 448 U.S. at 514 (Powell, J., concurring).

Similarly, the FCC has imposed no termination date for the Policy. The Policy has been in effect for 12 years already, and the FCC appears inclined to continue it indefinitely.<sup>33</sup> Again,

<sup>32</sup> Astroline, the FCC and *amici* argue that the Policy has thus far been applied in only a limited number of cases. *E.g.*, Astroline Br. at 30-31; FCC Br. at 43-44. From this they suggest that the Policy's extreme reach may somehow be ignored. But that reach cannot be ignored: in formulating the Policy, the FCC elected not to impose any limitations on the number of stations which would be subject to it, the FCC has never suggested that the Policy may be subject to any such limitations and, in view of the 1987 *Appropriations Act* (see n.12, *supra*), the FCC is now statutorily precluded from "apply[ing] changes in" the Policy in order to impose such limitations. The Court must review the Policy as that Policy has actually been articulated, not as Astroline and its supporters would prefer the policy to have been articulated. And in any event, even if Shurberg were the *only* party to suffer from the discriminatory effects of the Policy, "[t]he rights of every man are violated when the rights of one are diminished." Pet. App. 69a (MacKinnon, J., citing President John F. Kennedy).

<sup>33</sup> This inclination is illustrated here. Despite the fact that no stay of the mandate of the Court of Appeals has been sought or granted, the FCC has repeatedly refused to rescind the minority distress sale at issue in this case. See, *e.g.*, Shurberg's Motion for Leave to Withdraw Brief in Opposition to Petition for Certiorari, filed January 2, 1990, at 3-4. Indeed, the FCC even advised the Court of Appeals below that the FCC intended to leave Astroline in place as the Station's licensee *irrespective* of whether the FCC might ultimately conclude the Policy to be constitutionally flawed. Compare J.A. 79-80 (particularly (continued...))

this is dramatically different from the minority set-aside approved in *Fullilove*, where the race-based program would "not last longer than the discriminatory effects it [was] designed to eliminate." *Fullilove*, 448 U.S. at 513 (Powell, J., concurring). Of course, if the FCC intended to maintain the Policy until some particular percentage of minority broadcast ownership is achieved, the Policy would be "facially invalid". *Bakke*, 438 U.S. at 307 (Powell, J.).

Moreover, the Policy includes no provision for challenging the appropriateness of any particular distress sale: if an applicant satisfies the FCC's broad-brush definition of "minority", that applicant can take advantage of the Policy regardless of any other attributes (e.g., clear lack of economic disadvantage or historical victimization on the basis of race, apparent "sham" structure featuring minimal actual minority involvement) which might undermine the supposed remedial effect of the Policy. While *Astroline* asserts that the FCC's review of each proposed distress sale protects against potential abuse, *Astroline Br.* at 41-43, the facts of this case reveal that the FCC's review was (and remains) almost non-existent. See n. 9, *supra*.<sup>34</sup> This is

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<sup>33</sup>(...continued)

footnote 2 therein) with J.A. 14-15.

<sup>34</sup> The FCC does have some institutional familiarity with the notion of "sham" applications. See, e.g., *Susan S. Mulkey*, 3 FCC Rcd 590, 592, ¶16 (Rev. Bd. 1988). That familiarity relates to efforts, in the comparative licensing process, to take advantage of the comparative preference policy. The identification of shams in that context, however, is not attributable to the FCC. In comparative cases, competing applicants are permitted to test the validity of each others' claims through formal discovery and cross-examination. It is through such efforts by private parties that bogus claims of "minority control" are identified; the FCC itself does virtually nothing to identify shams. By contrast, an opponent of a distress sale application (for example, *Shurberg*) is given no discovery or cross-examination rights. And when, despite that, an opponent is able to present to the FCC persuasive evidence of a "sham" in this context, the FCC simply ignores it, as occurred below.

completely distinct from the set-aside program in *Fullilove*, which contained an explicit waiver provision designed to assure that the set-aside would be available to minority persons only when they were "economically or socially disadvantaged". See, e.g., *Fullilove*, 448 U.S. at 470-71 (Burger, C.J.).

### 3. *The Policy Has An Acute Adverse Impact On Non-Minorities.*

*Astroline*, the FCC and various *amici* attempt to belittle the nature and extent of the adverse impact which the Policy has on non-minorities. E.g., *Astroline Br.* at 30-33; *FCC Br.* at 41-46. Their argument is, however, misdirected.

Unlike the construction contracts at issue in *Fullilove*, broadcast licenses are unique -- the opportunity to file for a television station in Hartford, Connecticut is clearly distinct from the opportunity to file for a low-power AM station in a small rural community. *Shurberg's* sole principal is a life-long resident of Hartford who was, and remains, interested in obtaining the Station's license. Aware of the longstanding, statutorily-mandated, judicially-endorsed comparative renewal process, and aware that Faith Center's previous disqualifications would make it an easy target in a comparative renewal challenge, he sought to take advantage of that process.

The FCC's Policy prevented him from doing so. As Judge MacKinnon correctly observed below, this case involves a "rare opportunity . . . to attempt to obtain a license in a particular market. The distress sale program takes this opportunity away from every individual who is not classified as a minority as defined by the FCC." *Pet. App.*, 67a.<sup>35</sup>

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<sup>35</sup> See also *Pet. App.* 35a (opinion of Silberman, J.) ("... [Shurberg] has been absolutely denied an opportunity to compete for [a Hartford television station] merely because of his race. A chance to compete for a license elsewhere in the country is not an equivalent opportunity for Shurberg.")

III. Program Diversity Is Not a "Compelling Interest" Sufficient to Legitimize the Minority Distress Sale Policy and, in Any Event, That Policy Is Not "Narrowly Tailored" to Accomplish the Goal of Program Diversity.

A. "Program diversity" Is Not A "Compelling Interest" Necessitating Race-Based Classifications.

Astroline, the FCC and various *amici* argue that the Policy is constitutional because it is intended to increase diversity in programming. *E.g.*, Astroline Br. at 22-26; FCC Br. at 32-34. That position is untenable for a number of independent reasons.

First, as discussed above 16-21, the *only* "compelling interests" which might legitimize race-based governmental classifications are (1) appropriate findings of actual discrimination or (2) immediate threats to the public welfare. The vague notion of "increasing program diversity" does not fall into either of these categories.<sup>36</sup>

<sup>36</sup> The notion of "program diversity" as a "compelling" interest appears to be derived from Justice Powell's opinion in *Bakke*, where he suggested that an academic institution might be justified in implementing race-based criteria in order to assure a diverse student body. Even if Justice Powell's *Bakke* opinion represented the Court's position on the matter, the "program diversity" at issue here is clearly distinct from the "diversity" addressed there.

In Justice Powell's construct, the desired "diversity" would be achieved as an immediate result of the selection process: by picking a certain number of students of particular backgrounds, the academic institution could assure itself of an overall student body profile with a particular mix. The FCC's situation is different: the desired diversity arises, if at all, secondarily, based on the assumption that "minority" owners can and will invariably provide "minority" programming which would not otherwise be available. In this sense the FCC's policy is more akin to the argument, rejected by Justice Powell in *Bakke*, that minority medical school applicants are entitled to preference in order to ensure a sufficient number of doctors willing to serve minority communities. *See Bakke*, 438 U.S. at 310-11.

A related distinction is the fact that applicants to medical school are individuals whose individual, *personal*, attributes (including minority identity) are  
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This is not to say that program diversity is not desirable. To the contrary, it is clearly desirable to maximize the free flow of ideas and to promote robust public debate. *E.g.*, *Associated Press v. United States*, 326 U.S. 1, 20 (1945). But it is neither necessary nor desirable for the government to undertake the promotion of diversity in a content-related manner. Indeed, the First Amendment itself reflects the contrary position that freedom of expression will flourish best when the government plays no regulatory role whatsoever. U.S. Const. amend. I; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974). While non-content-related FCC policies promoting diverse programming have been upheld, the Court has stated that the issue "would be wholly different if 'the Commission [were] to choose among applicants upon the basis of their political, economic or social views.'" *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 801 (1978), quoting *National Broadcasting Company v. United States*, 319 U.S. 190, 226 (1943).

The Policy is unquestionably "content-related" in precisely that objectionable sense: the Policy's operation is based on the FCC's notion that "minority" licensees will, because of their "minority" identity, perforce provide some kind of "minority programming" which is substantively different from, and preferable to, that which non-"minorities" could provide. Such

<sup>36</sup>(...continued)

clearly discernible and unquestionably permanent. By contrast, the Policy is available to business entities the "minority" character of which may be, at most, purely cosmetic and ephemeral. *See* n.34, *supra*, n.49, *infra*. *See also* Comment, "FCC Tax Certificates for Minority Ownership of Broadcast Facilities: A Critical Re-examination of Policy", 138 U.Pa.L.Rev. 401, 440-42 (1990) ("Comment, *Tax Certificates*") (pre-publication proof) (describing issuance of minority tax certificate valued in the range of \$100 million where the non-minority individual who arranged for all the financing holds contractual right to acquire the station - WTVT-TV, Tampa, Florida - from Clarence McKee, the supposedly controlling minority who, it happens, was a member of the FCC Taskforce which advocated adoption of the 1978 Policy Statement.).

content-based favoritism runs counter to the First Amendment. See *Buckley v. Valeo*, 424 U.S. at 48-49 ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").<sup>37</sup>

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<sup>37</sup> The FCC's apparent notion that there exists some type of "minority programming" reflecting a "minority viewpoint" is shared by Astroline and various amici. E.g., FCC Br. at 35-38; NABOB Br. at 4-5. But at no time has the FCC, Astroline or any amicus attempted to define for the Court the "minority programming" or the "minority viewpoint" which they believe justifies an otherwise clearly unconstitutional policy. Are *The Cosby Show*, *The Oprah Winfrey Show*, and *Geraldo* "minority programming" because they feature minority personalities? But that standard would encompass *Amos 'n' Andy* and *I Love Lucy*, which might not be deemed "minority programming" by the amici. Was *Roots* "minority programming", even though it was produced by a "white"-owned company, distributed by a "white"-owned television network, and broadcast in 1977, the year before the 1978 Policy Statement?

The failure of the FCC *et al.* even to attempt a definition is not surprising, because any effort to define "minority programming" and "minority viewpoint" reveals immediately the fallacy of those concepts. Essential to those concepts is the assumption that any "minority" person, by virtue solely of her or his race or ethnicity, will invariably impart some inherent "viewpoint" to programming which no non-minority person could. Such a notion is nothing but racism, albeit cloaked in a benign disguise. The assumption that all members of any race will think or act in any common way merely because of their common race is thoughtless, invidious stereotyping which runs counter to common sense and experience. The fact that some white persons may belong to the Ku Klux Klan does not support the conclusion that all whites – or even many whites – also belong. By the same token, the fact that some blacks (including as prominent a figure as Jesse Jackson, see B. Faw & N. Skelton, *Thunder in America*, 47-80 (1986)) may refer to Jews as "Hymies" does not support the conclusion that all blacks do so.

The Policy is especially objectionable not only because it is based on such fundamentally wrong-headed assumptions, but also because it then assigns qualitative values to those assumptions. The result, in the FCC's eyes, is that the programming which any "minority" person is presumed to be ready, willing and able to broadcast is preferable to the programming which any non-minority person would provide. Such a proposition is unsupported in experience, invalid in theory, and inconsistent with the Constitution.

See also nn.50, 51, *infra*, and accompanying text.

Far from supporting the Policy, First Amendment considerations counsel strongly against the Policy. The FCC is thus in an inescapable Catch-22 position: if, in order to avoid any conflict with the First Amendment proscription against governmental regulation of content, the FCC were to assert that the Policy is *not* "content-based", then the FCC would be effectively conceding that the Policy cannot rationally be deemed to promote "program diversity" in any meaningful sense; but if the FCC adheres to its "program diversity" claims, then it is effectively conceding that the Policy represents "content-based" regulation inconsistent with the First Amendment.

But even if it is assumed *arguendo* that the promotion of "program diversity" is a "compelling" governmental interest in theory, it is clear that that goal can be achieved without reliance on race-based schemes. The FCC itself has repeatedly rejected narrowly-tailored, non-race-based, content-neutral governmental mechanisms to promote diversity *not* because those mechanisms were ineffective, but because they were, in the FCC's own view, unnecessary.<sup>38</sup> Thus, the FCC apparently does not believe

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<sup>38</sup> See, e.g., *Deregulation of Radio*, 84 F.C.C.2d 968, 1066 (1981)("all types of minority needs, be they racial, ethnic, or taste, can be and indeed are being well met through increasing the number of stations"); *Deregulation of Commercial Television*, 98 F.C.C.2d 1076, 1087 (1984)("market demand is determining the appropriate mix of . . . programming", resulting in an appropriate overall "programming mix"); *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 221, 225 (1985)(FCC believes that "sufficient amounts of programming covering controversial issues of public importance" will be provided by available media systems and that "[t]he public has access to a multitude of viewpoints without the need or danger of regulatory intervention"); *Development of Policy re Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858, 863 (1976)(the radio marketplace, rather than administrative fiat, "is the best available means of producing the diversity to which the public is entitled").

Also, in order to promote diversity, the FCC has adopted multiple ownership rules which limit, *inter alia*, the number of broadcast stations any one individual or entity can hold. See 47 C.F.R. §73.3555. The goal of program diversity could be achieved by the race-neutral, content-neutral means of

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that the promotion of program diversity warrants even limited, well-defined, race-neutral, case-by-case administrative involvement. In light of this, the FCC cannot legitimately claim that its interest in "program diversity" is so compelling as to justify a blunderbuss, racially exclusive policy such as the Minority Distress Sale Policy.

*B. The Policy Is Not "Narrowly Tailored" to Achieve Program Diversity.*

But even if "program diversity", in the abstract, could be deemed *arguendo* to be a "compelling interest" for the purposes of strict scrutiny analysis, that asserted justification fails the second element of the analysis. Far from being "narrowly tailored", the Policy bears absolutely no relationship to the supposed goal of program diversity. Assessed objectively, the Policy is nothing more than race-based redistribution of economic opportunities, an administrative attempt to give "minorities" a "piece of the action". See *Fullilove*, 448 U.S. at 536 (Stevens, J., dissenting).<sup>39</sup>

The Policy offers *no assurance whatsoever* that program diversity will, or even may, be increased. The FCC itself has repeatedly conceded that, prior to 1987, no record existed in support of the crucial assumption that "minority ownership" will inevitably lead to diversity-producing "minority programming".

<sup>38</sup>(...continued)

reducing to one the maximum number of stations which can be held by any individual or entity. Rather than take that approach, though, the FCC has moved in the *opposite* direction by *relaxing* the maximum limit from seven stations in any service to 12 stations in any service. *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17 (1984).

<sup>39</sup> See n.31, *supra* and n.49, *infra*.

*Steele Brief* at 22; *Steele Inquiry*, J.A. 53-56.<sup>40</sup> While the FCC attempted, after making that concession, to develop such a record, Congress prevented it from doing so in the 1987 *Appropriations Act*.<sup>41</sup> Thus, the crucial assumption remains unsupported.<sup>42</sup>

<sup>40</sup> In its Brief here, the FCC generally ignores its earlier representations to the Court of Appeals and, instead, cites in support of its position various materials pre-dating those representations. In so doing, the FCC opens its *bona fides* to serious question: did the FCC misinform the court below (in its *Steele Brief*) and the public (in the *Steele Inquiry*), or is the FCC misinforming this Court? Shurberg recognizes the political difficulties faced by an agency whose appropriations are dependent on annual Congressional approval. But those difficulties do not justify the FCC's blithe, unexplained, see-saw shifts relative to the constitutionally sensitive matters at issue here. At a minimum, those shifts counsel against according *any* deference to the FCC.

<sup>41</sup> Even if some administrative (or legislative) record had been compiled in 1987 in support of the Policy, the fact remains that the agency action which is the subject of this case was taken in December, 1984. As Judge Silberman noted below, it is not clear how "statements made in 1987 can be relevant to the question of whether the distress sale policy was constitutional as applied to Shurberg in 1984." Pet. App. 51a.

<sup>42</sup> Faced with this evidentiary void, Astroline *et al.* cite various sources including, for example, the Report of the National Advisory Commission on Civil Disorders ("Kerner Report"), which was issued more than 20 years ago. Astroline Br. at 46-46. But in view of the FCC's 1986 assertions that no record support for the assumed minority ownership/minority programming nexus had theretofore been developed, *Steele Brief* at 22, *Steele Inquiry*, J.A. 53-56, reliance on any pre-1986 sources, including the Kerner Report, contradicts the FCC, which itself formulated the Policy. Moreover, the Kerner Report is in any event badly out-dated: while some vestiges of discrimination may still be found in some areas of society, the "absence of Negro faces" in the broadcast press noted by the Kerner Commission (and now relied on by the FCC, FCC Br. at, e.g., 28) seems to be a thing of the past. For example, a cursory review of Washington, D.C. television stations' news programs indicates that blacks presently hold as many as 50% of the on-air news anchor and reporting positions on those stations. Further, in view of the unique history of blacks in American society, any findings based on that history cannot legitimately be transposed to the benefit of other groups whose histories wholly differ, in

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In any event, if program diversity through "minority programming" is the goal of the Policy, the Policy is not at all tailored to achieve that goal. A "minority" applicant seeking to acquire a station pursuant to the Policy need assert *only* that the applicant is "minority-controlled".<sup>43</sup> A "distress sale" applicant is *not* required to commit itself to, or even to tentatively propose, *any* particular type of programming in any particular amount.<sup>44</sup> A "distress sale" applicant is *not* required to commit that *any* minority principal(s) will be involved in *any* way

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<sup>42</sup>(...continued)

nature and degree, from the history of blacks.

The FCC and others also claim that a Congressional Research Service Report, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (June 29, 1988), reveals some link between minority ownership and minority programming. *E.g.*, FCC Br. at 26. That Report was prepared in June, 1988, ten years after the Policy was adopted, almost four years after the agency action on appeal here, and six months after passage of the 1987 *Appropriations Act*. It may be ignored here as a belated effort to make a showing which (if it could be made at all) should have been made a decade ago. Even if the Report's substance is considered, the Policy fares no better. The Report has been correctly criticized as so seriously flawed, conceptually and definitionally, as to be completely unreliable. *Winter Park*, 873 F.2d at 358-67 (Williams, J., dissenting).

<sup>43</sup> It bears repeating that while the FCC imposes this minimal requirement, the FCC does not appear even to care whether minorities are in *actual* control of the applicant, as long as the applicant makes the self-serving assertion that it is "minority-controlled". See n.9, *supra* and accompanying text.

<sup>44</sup> By contrast, in other broadcast licensing contexts, the FCC historically considered, and relied on, an applicant's programming commitments, including commitments involving "specialized programming" directed to minorities. See *Deregulation of Radio*, 84 F.C.C.2d at 975 (describing quantitative commercial radio nonentertainment programming guidelines, since deregulated as unnecessary); *Deregulation of Commercial Television*, 98 F.C.C.2d at 1078 (describing history of quantitative commercial television nonentertainment programming guidelines, since deregulated as unnecessary); *George E. Cameron Jr. Communications*, 71 F.C.C.2d 460, 464-66 (1979).

in the station's programming.<sup>45</sup> A "distress sale" applicant is *not* required to demonstrate that there is a need for any particular type of programming in the station's service area.<sup>46</sup> A "distress sale" applicant is not required to be a resident of, or even remotely familiar with, the community in which the subject station is located.<sup>47</sup> A "distress sale" applicant is *not* required to commit to the employment of any particular quota of minorities.<sup>48</sup> A "distress sale" applicant is *not* required to

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<sup>45</sup> By contrast, in the comparative licensing process, a "minority-controlled" applicant may obtain enhanced comparative credit from its "minority" identity *only* to the extent that that applicant can demonstrate that its minority principal(s) will in fact be involved in the station's day-to-day management. *E.g.*, *Las Misiones de Bejar Television Co.*, 93 F.C.C.2d 191, 194 (Rev. Bd. 1983).

<sup>46</sup> By contrast, in the comparative licensing context, before the FCC will consider awarding enhanced comparative credit for a "specialized programming" proposal, the applicant advancing the proposal must make a threshold showing that there is a "need" for such programming. *George E. Cameron Jr. Communications*, 71 F.C.C.2d at 464-465.

<sup>47</sup> By contrast, in the comparative licensing context, the FCC has stated that minority status and local residence (irrespective of race) are factors of "equal significance" in their possible effect on programming. *Radio Jonesboro, Inc.*, 100 F.C.C.2d 941 (1985).

<sup>48</sup> The FCC's Rules do require broadcast licensees to hire on a non-discriminatory basis and to make affirmative efforts to recruit minority job candidates. See 47 C.F.R. §73.2080. But, contrary to the unsupported claims of, *e.g.*, *Amicus NABOB* (NABOB Br. at 5), minority owners do not necessarily hire minorities of their own race or ethnicity. For example, since 1986 Cook Inlet Communications, Inc. ("CICI"), a company owned by Alaska natives, see 1989 *Senate Subcommittee Hearing*, 6 (Testimony of Roy M. Huhndorf) ("Huhndorf Testimony"), has availed itself of the minority tax certificate policy to obtain the licenses of two television stations – one in Nashville, TN, the other in New Haven, CT – and eleven radio stations in: Morningside, MD; Provo, UT; Scottsdale, AZ; Atlanta, GA; Houston, TX; Boston, MA; Chicago, IL; and Seattle, WA. The Annual Employment Reports (FCC Form 395) filed with the FCC by each of these stations reflects that *none* of them has *any* full-time employees who are Alaska natives; of a total of 453 full-time and part-time

(continued...)

retain the station for more than one year (see *Amendment of Section 73.3597 of the Commission's Rules*, 99 F.C.C.2d 971, 974 (1985)), or to sell it only to a buyer committed to "program diversity".<sup>49</sup> Following a distress sale, the FCC makes no *post hoc* effort to determine whether the "distress sale" purchaser has, in fact, increased programming diversity.<sup>50</sup>

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<sup>48</sup>(...continued)

employees reported by CICI at all of its stations, only one part-time employee is listed as an Alaska native. See Resp. Supp. 122 *et seq.*

<sup>49</sup> In fact, the FCC's Review Board has found that one distress sale buyer abused the distress sale process by "acquir[ing] four 'distressed' radio stations through the [Minority Distress Sale] process with the express intent of bringing minority ownership and participation to only one of the four stations." *Silver Star Communications-Albany, Inc.*, 3 FCC Red 6342, 6352 (Rev. Bd. 1988). The individual distress sale buyer in that case was also the buyer of two other distress sale stations. *Id.* at 6343. That is, the individual who was the approved distress sale buyer in 16% of all the distress sales granted by the FCC was found to have abused the distress sale process. See also Comment, *Tax Certificates*, 138 U.Pa.L.Rev. at 440-42.

<sup>50</sup> The record of this case illustrates what such follow-up monitoring would likely show. After one year of operation, Astroline voluntarily provided the FCC with a summary of its programming. That summary indicated that Astroline had in fact broadcast a relatively slight amount of Spanish-language programming (far less than the full-time Spanish-language television service which was then, and still is, operating in Hartford). J.A. 24-27. But Astroline, supposedly controlled by a non-black Hispanic, also touted the fact that it had provided "minority" programming (J.A. 25), by which it appears to have meant programming aimed at a black audience. The programs included in that showing were: *Soul Train* (a music and dance program akin to *American Bandstand*); *Julia* (a syndicated program produced in 1968-1971, featuring Diahann Carroll as a nurse); and *Essence* (a weekly program akin to *Entertainment Tonight*, focusing on "major Black celebrities", J.A. 25). Astroline also touted its "local" programming, which consisted primarily of telecasts of the local professional ice hockey team, a local college basketball team, and *Pepsi Duckpin Challenge*, a bowling show. J.A. 25. It is therefore far from clear that Astroline's racial or ethnic identity, whatever it might be, resulted in any increase in program diversity which could not have been achieved by any other licensee regardless of its racial or ethnic composition.

(continued...)

A more fundamental consideration further undermines the assertion that the Policy is narrowly tailored to promote program diversity. That assertion is based on the predictive notion that minority ownership will ineluctably result in a kind of "diversity" which cannot be achieved through non-race-based means. But that notion is plainly racist, since it blindly assumes that various "minority" groups may be viewed as homogeneous monoliths and that the "diversity" which *any* member of *any* of those groups might provide is somehow preferable to that which *any* non-minority person could provide. Such notions are totally inconsistent with the guarantee of equal protection which the Constitution affords to *individuals*, not to races or ethnic groups. See *Fullilove*, 448 U.S. at 526 (Stewart, J., dissenting), citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). There is no difference between "minority" and non-"minority" persons with respect to their inherent ability to enhance program diversity. This principle is identical to that advanced by the Appellants in *Brown v. Board of Educ.*, who observed that "[w]hatever differences exist in this regard are individual and not racial." Appellants' Statement as to Jurisdiction in *Brown v. Board of Educ.*, No. 51-1, at 12.<sup>51</sup>

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<sup>50</sup>(...continued)

This is not unique to Astroline. An officer of CICI, the company owned by Alaska natives (see n.48, *supra*), testified before the Senate Telecommunications Subcommittee that CICI "do[es] not seek to dictate programming decisions with a view to ensuring the expression of Native American viewpoints and sensitivity to minority viewpoints generally." 1989 Senate Subcommittee Hearing, 5 (Huhndorf Testimony).

<sup>51</sup> By effectively dividing society into two groups, *i.e.*, "minority" and "non-minority", the FCC also seems to assume that the various distinct racial or ethnic components of the "minority" portion of society are all themselves fungible and able to serve one another better than could any non-minority. This is illustrated by Astroline's claims concerning its non-Hispanic programming. See n.50, *supra*. But what basis is there to say, for example, that an Hispanic licensee can serve a black audience "better" than a white licensee? Indeed, the ability of a non-minority licensee to provide "superior" and "extraordinary" public service to an Hispanic audience has been established. See *Tele-*

(continued...)

The FCC's adoption of this approach thus serves the unfortunate purpose of reinforcing racial stereotypes by demonstrating implicitly that

the apportionment of rewards and penalties can legitimately be made according to race -- rather than according to merit or ability -- and that people can, and perhaps should, view themselves and others in terms of their racial characteristics.

*Fullilove*, 448 U.S. at 532 (Stewart, J., dissenting). Such further atomization of our society according to race and ethnicity is precisely what the guarantee of equal protection was intended to prevent.

#### IV. The Court of Appeals Did Not Improperly "Disregard" Any Action of the Congress.

Astroline and its supporters argue that the Court of Appeals below improperly "disregarded" Congress' "express approval and adoption" of the Policy. *E.g.*, Astroline Br. at i. This argument is wrong on a number of counts.

##### A. Congress Has Never "Expressly Approv[ed] and Adopt[ed]" the Minority Distress Sale Policy.

First, Astroline is incorrect when it suggests that Congress has ever "expressly approv[ed] and adopt[ed]" the Policy: Congress has never codified the FCC's Minority Distress Sale Policy.<sup>52</sup>

<sup>51</sup>(...continued)

*Broadcasters of California, Inc.*, 58 Rad. Reg. 2d (P&F) 223, 231 (Rev. Bd. 1985). See also *Intercontinental Radio, Inc.*, 98 F.C.C.2d 608, 635 n.70 (Rev. Bd. 1984)(non-minority licensee credited with service to black audience).

<sup>52</sup> In fact, at least one proposal specifically designed to codify, *inter alia*, the Policy has failed. H.R. 1090, 100th Cong., 1st Sess. (1987).

The *only* Congressional action which is even arguably relevant here is the 1987 Appropriations Act, the relevant portion of which is quoted at n.12, *supra*.<sup>53</sup> The 1987 Appropriations Act did not purport to codify the Policy. At most it merely instructed the FCC, first, to abandon its then on-going *Steele Inquiry* and, second, to maintain the *status quo ante*. Because the provision was included in an appropriations measure, it is by its very nature temporary. This is hardly the "approv[al] and adopt[ion]" which Astroline suggests.<sup>54</sup>

##### B. Congress' Action Does Not in Any Event Cure the Policy's Unconstitutionality.

Even if the substance of the 1987 Appropriations Act were to be interpreted in the light most favorable to Astroline, it would still not correct the obvious constitutional flaws in the Policy.

<sup>53</sup> Astroline, the FCC and others argue that Congressional action in 1982 is relevant to the Policy. *E.g.*, FCC Br. at 23. But the Congressional action relied on included no consideration whatsoever of the Policy itself. At most, the 1982 Conference Report contained a passing citation to the FCC's 1978 Policy Statement, without any reference at all to the Minority Distress Sale Policy. 1982 Conference Report, 44. Since Congress did not even mention, much less "approve" and "adopt", the terms of the Policy in 1982, Congress' 1982 action cannot properly carry the load which the FCC *et al.* attempt to impose on it.

<sup>54</sup> Justice Stevens has suggested that judicial review of race-based legislation may focus in particular on underlying legislative procedures. *Fullilove*, 448 U.S. at 550-51 (Stevens, J., dissenting). Here, the narrow FCC-related provision was buried in a massive appropriations act affecting the entire Federal government. The limited available legislative history reflects little or no detailed consideration by either house of Congress. This is a far cry from the situation in *Fullilove*, where the Court relied on extensive legislative history reflecting a "considered decision" of Congress. See *Fullilove*, 448 U.S. at 463-67, 473 (opinion of Burger, C.J.). Continued lack of consideration is also apparent in the fact that the two subsequent appropriations acts which have maintained the 1987 language call, in identical language, for the termination of the FCC's *Steele Inquiry*, even though the FCC terminated that proceeding two years ago.

1. *Congress' Action Was An Impermissible Legislative Invasion Of The Adjudicatory Process.*

The FCC action on review in this case was taken in December, 1984. Shurberg immediately appealed that action, specifically challenging, *inter alia*, the constitutionality of the Policy. The case (including that issue) had been briefed and argued to the Court of Appeals by January, 1986. In 1987, the Court of Appeals remanded only the record of the case, *see* D.C. Cir. R. 15(c), for the specific, limited purpose of permitting the FCC (at the FCC's own urging) to undertake further inquiry into the constitutionality of the Policy.

It appears from one published report that Astroline then undertook a substantial lobbying effort designed to short-circuit the further adjudication of this case. J.A. 85. That lobbying effort reportedly resulted in the particular language of the 1987 *Appropriations Act* relating to the FCC's minority ownership policies. *Id.* That language, arguably the result of a politically-motivated spoils system, was designed to preclude FCC review of the Policy's constitutionality and to provide, *post hoc* and *nunc pro tunc*, an apparent Congressional imprimatur for the Policy. The Act is thus nothing more than a *post hoc* legislative attempt to affect the outcome of a particular adjudicatory proceeding, pending before an Article III court, by retroactively considering an agency policy which, prior to Shurberg's challenge initiated three years earlier, had not been considered at all by Congress. Such legislative intrusion into on-going adjudication is inconsistent with the constitutional separation of powers and with Shurberg's right to due process. *See United States v. Klein*, 80 U.S. 128, 145-48 (1872)<sup>55</sup>; *Pillsbury Co. v.*

<sup>55</sup> *See also* Judge Silberman's opinion below, Pet. App. at 50a, n.39 ("there is little difference between stripping a court of jurisdiction and stripping the Executive Branch or an independent agency of authority to comply with orders of the court. Cf. *United States v. Klein*, 80 U.S. 128, 145 (1872) (Congress exceeds power under exceptions clause when 'language of the [statute] shows (continued...)")

*FTC*, 354 F.2d 952, 964 (5th Cir. 1966).<sup>56</sup> While Congress is certainly able to enact legislation having *prospective* effect,<sup>57</sup> it should not be permitted to act in a manner clearly designed retroactively to shore up the arguments of a particular litigant in a particular pending case, especially when the proponent of the action is the litigant benefited thereby.

In view of the clear unfairness inherent in Congress' attempt to change the rules retroactively, that portion of the 1987 *Appropriations Act* can and should be ignored in the disposition of this case.

2. *The 1987 Appropriations Act Does Not Correct the Constitutional Flaws of the Policy.*

Even if the 1987 *Appropriations Act* could properly be considered in this case, it would not save the Policy. As discussed above, any race-based governmental classification is presumptively unconstitutional unless narrowly tailored to address a compelling interest. *See supra*, 14-21. This analysis is not substantially altered by the fact that the 1987 *Appropriations Act* is an act of Congress. *See* n.16, *supra*.<sup>58</sup> This is especially

<sup>55</sup> (...continued)

plainly that it does not intend to withhold jurisdiction except as a means to an end."); *Ex Parte McCordle*, 74 U.S. 506 (1869).")

<sup>56</sup> Lest there be any question of Congress' intrusive intent with respect to the instant case, *see* S. Rep. No. 182 100th Cong., 1st Sess. 77 (1987) (instructing the FCC to affirm its grant of the Faith Center/Astroline distress sale); 1986 *House Subcommittee Hearing* at, e.g., 57 (Rep. Collins polls FCC Commissioners on "what do you think you are going to do in . . . the Shurberg case?").

<sup>57</sup> *See, e.g., Croson*, 109 S.Ct. at 731 (Stevens, J., concurring).

<sup>58</sup> *See also Fullilove*, 448 U.S. at 496 (Powell, J., concurring). The decision in *Fullilove* does not undermine this principle. Particularly in view of the fact (continued...)

so in view of the fact that the *1987 Appropriations Act*, by its own terms, was intended to ossify the Policy, not to correct any of its multiple infirmities.

According to the language of the Conference Report accompanying the *1987 Appropriations Act*, Congress perceived the purpose of the FCC's minority ownership policies to be the promotion of diversity in programming. *1987 Senate Report* at 76. But that purpose cannot be deemed a "compelling interest" sufficient to justify race-based classifications. *Supra*, 16-21, 33-38. And even if it were deemed, *arguendo*, to be "compelling", the

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<sup>58</sup>(...continued)

that no single opinion in *Fullilove* commanded a majority of the Court, it is difficult to divine any governing standards therefrom. At most, *Fullilove* stands for the proposition that, where a facial challenge is directed to a Congressional action, and where that Congressional action was taken pursuant to Section 5 of the Fourteenth Amendment in an effort to remedy prior discrimination at the State level as to which an adequate legislative record had been compiled, the Congressional action may be upheld if it is "narrowly tailored" to correct the effects of that prior discrimination. Each of the factors cited in the preceding sentence -- i.e., the facial nature of the challenge, the source of constitutional authority relied upon by Congress, the remedial nature of the legislation, the existence of a record of discrimination at the State level, the narrowness of the legislation -- appears to have been crucial to the disposition of *Fullilove*. See, e.g., *id.*, 448 U.S. at 490 (Burger, C.J.) and 499 (Powell, J., concurring).

The instant case is distinguishable from *Fullilove* on each of those crucial factors. This challenge involves both a facial challenge and an "as applied" challenge to the Minority Distress Sale Policy. To the extent that Congress may be said to have considered that Policy at all, it did *not* seek to remedy past discrimination at the State level, but to promote diversity in programming; Congress was not acting pursuant to the remedial authority encompassed in the Fourteenth Amendment. Congress relied on virtually no record whatsoever establishing discrimination in the broadcast licensing process. And finally, the Minority Distress Sale Policy is not at all "narrowly tailored" either to address any possible discrimination or to promote program diversity.

Thus, even if *Fullilove* continues to have any precedential value outside of its own very constricted factual setting, it does not alter the clear fact that the Minority Distress Sale Policy is unconstitutional even if Congress may be deemed, *arguendo*, formally to have "approv[ed] and adopt[ed]" it as alleged by Astroline.

Policy would still have to be "narrowly tailored" to address that interest; Congress took no steps whatsoever to alter the undeniable fact that the Policy is not at all so tailored. Rather, it simply mandated a temporary return to the situation *status quo ante*, which situation was, as discussed above, inconsistent with the Constitution.

## CONCLUSION

The constitutional guarantee of equal protection establishes two fundamental parameters which govern the nation's social and political ecologies: all individuals are presumed to be equal, and the government *must* treat them so. These parameters limit the government, but free the individual to compete on his or her own merits, to succeed or fail according to his or her abilities. To be sure, historically the ideals embodied in that guarantee were not universally honored; but the inclusion of the guarantee in the Constitution reflects the nation's determination that those ideals can, should and must be honored.

The concept of equal protection assumes that all persons will enjoy equal opportunities free of discrimination. Where the premise of nondiscrimination is invalid, the government may take appropriate remedial action designed to restore to the particular victims of the discrimination the equal opportunities of which they have been deprived, and thus to restore the validity of the premise. But the authority to act in such instances is of necessity narrowly confined to remedial measures directed to specific instances of discrimination. Without such a restriction, the delicate balance of our social and political ecologies would be grievously threatened: an individual's right to equal treatment by the government -- a right which should be immutable -- would be subject to quicksilver shifts in public sentiment, as one racial or ethnic group after another would seek and, possibly, secure preferred treatment based on factors which the Constitution now declares irrelevant. The result would be the antithesis of equal protection.

The FCC's Policy is clearly an unnecessary, non-remedial, and therefore unconstitutional, race-based classification as a result of which Shurberg has suffered because of Alan Shurberg's race. The nation would be well-served if the Court would unmistakably declare that such classifications cannot co-exist with the guarantee of equal protection. The lack of any such unmistakable declaration to date has led only to confusion and delay, as evidenced by the multi-year deliberations of the court below which resulted in three lengthy separate opinions. Both in the narrow context of this case and far beyond its horizons, the lack of clear standards has forced -- and will continue to force -- individual parties such as Shurberg to run marathon legal gauntlet after marathon legal gauntlet to achieve that which the Constitution already guarantees. It is essential now that this Court make clear that private, parochial interests cannot be permitted to override those most fundamental society-wide interests embodied in the constitutional guarantee of equal protection.

The judgment of the court of appeals should be affirmed for the reasons stated.

Respectfully submitted.

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<sup>59</sup> Counsel for Shurberg wishes to acknowledge the substantial assistance provided him by Alan Shurberg in the formulation and preparation of this brief.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

*Respondent.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The District Of Columbia Circuit

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v.

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Respondent.*

**REPLY BRIEF FOR PETITIONER**

The Acting Solicitor General, the respondent, and the *amici* who support them all contend that the Federal Communications Commission, having presided over the creation of a broadcast industry from which minorities were excluded, now lacks the power to mitigate that exclusion, even by so modest a means as the distress sale policy at issue here. They maintain that the FCC is helpless despite Congress' express endorsement and adoption of the FCC's minority ownership policies, or the FCC's constitutional and statutory duty to advance diversity of viewpoint in the limited resource of the broadcast spectrum. To the contrary, nothing in the equal protection component of the Fifth Amendment or in the decisions of this Court paralyzes the ability of the national legislature to adopt "so modest and targeted a program furthering such a compelling aim . . .". *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 953

(D.C. Cir. 1989) (Wald, C.J., dissenting), *cert. granted*, 110 S. Ct. 715 (1990).

**I. THE DISTRESS SALE POLICY DOES NOT STIGMATIZE MINORITY BROADCASTERS.**

Invoking the statement in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721 (1989) that racial distinctions "carry a danger of stigmatic harm," the Acting Solicitor General attacks what he describes as "an official *presumption* that the color of a person's skin or his ethnic background will predict the way he will think and act." U.S. Br. 22 (emphasis in original). But no such presumption underlies the FCC's minority ownership policies. Rather, those policies rely on principles concerning the public value of diversity of expression that are deeply rooted in the decisions of this Court.

The Acting Solicitor General suggests that the FCC's policies rest on mechanistic assumptions about the relationship between skin color and expression: that the beliefs and expression of individual broadcasters can be confidently predicted from their ethnic background. But the FCC has never maintained that ethnicity and expression bear a one-to-one correspondence in individual cases. Rather, the FCC's policies reflect the sensible conviction that in the *aggregate*, greater diversity of viewpoint should be expected in a broadcast industry in which minorities are represented as owners than in a broadcast industry from which they are excluded.

That reasonable expectation flows not from skin color, but from the indisputable fact that the experiences, perspectives, and views of minorities are not identical with those of the white majority in this coun-

try. Who would seriously contend that on questions such as national policy toward South Africa, or immigration policy, or bilingual education, that public opinion polls would produce results among members of minority groups that mirrored the views of the majority?

Acceptance of these propositions neither stigmatizes nor stereotypes minorities; it recognizes reality. Justice Powell, in his pivotal opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978), warned that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." Justice Powell's warning was the source of the Court's concern regarding the "danger of stigmatic harm" that appears in the plurality opinion in *Croson*, 109 S. Ct. at 721. But Justice Powell, alert to the risks of racial stereotyping, found *no* such stigma in a university admissions program that takes into account the differing backgrounds and experiences of its students.

An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

438 U.S. at 314 (footnote omitted).

The fact is that the Acting Solicitor General uses the concept of "stereotyping" very differently than

Justice Powell did in *Bakke* or the Court did in *Croson*. Those stereotypes brand minorities as unable to succeed in a competitive arena—medical school admissions in *Bakke*, competitive bidding for public contracts in *Croson*—without a governmental boost to give them an advantage over nonminorities seeking the same goal. It is something very different, as Justice Powell recognized in *Bakke*, to acknowledge that minorities may have distinctive views and perspectives worthy of expression. Acceptance of that indisputable fact is not “stereotyping” of any description, and it is a far cry from the racial stereotyping addressed in *Bakke* and in *Croson*.

The principle that diversity of membership (and the diversity of expression it encourages) contributes to the proper functioning of public institutions considerably predates *Bakke* in the decisions of this Court. The Court has long held that defendants are deprived of their Sixth Amendment right to trial by an impartial jury when the venire fails to represent a fair cross-section of the community. “That traditional understanding [of how an impartial jury is assembled] includes a representative venire, so that the jury will be, as we have said, ‘drawn from a fair cross section of the community. . . .’” *Holland v. Illinois*, 110 S. Ct. 803, 807 (1990), quoting *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (emphasis added by the Court).

In *Taylor*, the Court held that a venire could not represent a fair cross-section of the community “if large, distinctive groups are excluded from the pool.” 419 U.S. at 531. “Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared

with the constitutional concept of jury trial.” *Id.* The reason for this, the Court explained, is that the exclusion of segments of the community from jury service deprived the jury’s deliberations of the perspectives of members of those groups. The Court found no difficulty in concluding that diverse community groups—whether defined by ethnicity or, as in *Taylor*, gender—contributed distinctive perspectives to expression within the jury room.

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

*Taylor*, 419 U.S. at 532 n. 12, quoting *Peters v. Kiff*, 407 U.S. 493, 503-504 (1972). See also *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (“[i]ndividual jurors bring to their deliberations ‘qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable[.]’” quoting *Peters*, 407 U.S. at 504); *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (“wholesale exclusion of these large groups [blacks, women, and Mexican-Americans] from jury service clearly contravened all . . . of the aforementioned purposes of the fair-cross-section requirement”).

These principles echo the premises on which the FCC’s minority ownership policy is based. The Court

has never regarded as either a stigma or a stereotype the constitutional principle that all distinctive community groups be included in the jury venire. The Court has simply assumed—and there is no reason to doubt that assumption—that discrete groups within the community will have distinctive views to impart, even though precisely what those views might be cannot be predicted for any particular juror or any particular case. Just as the fair cross-section principle serves to ensure the impartial jury guaranteed by the Sixth Amendment, so do the FCC's minority ownership policies seek to achieve "the public's interest in receiving a balanced presentation of views" required under the Communications Act and the First Amendment. *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984).<sup>1</sup>

## II. CONGRESSIONAL APPROVAL OF THE DISTRESS SALE POLICY'S ENDS AND MEANS CANNOT BE DISREGARDED.

The Acting Solicitor General concedes Congress' broad remedial powers and the legitimacy of the governmental goal to promote diversity of opinion and viewpoint. U.S. Br. 21. Moreover, it is undisputed that Congress has acted on four separate occasions to express in legislation its approval of the FCC's minority ownership policies, including the distress sale policy at issue here. But through a series of ingenious

<sup>1</sup> Nor has the Court required empirical proof of this principle. In *Ballard v. United States*, 329 U.S. 187 (1946), the "view that an all-male panel drawn from various groups in the community would be as truly representative as if women were included, was firmly rejected[.]" *Taylor*, 419 U.S. at 531. But empirical proof of this proposition did not appear until at least 10 years afterward. *Id.* at 532 n. 12.

procedural objections, the Acting Solicitor General seeks to avoid the force of Congress' express exercise of its legislative authority.

• The Acting Solicitor General argues that "Congress has never adopted legislation that expressly directs the FCC to adopt a distress sale policy in order to promote programming diversity." U.S. Br. 23. There are two assertions imbedded in this point, and both of them are incorrect. *First*, the Acting Solicitor General appears to find a distinction of constitutional dimensions between legislation that commands the FCC to establish a race-conscious policy, and legislation that commands the FCC not to discontinue a policy already in place that meets with Congress' approval. Why such a distinction should make a constitutional difference is inexplicable, and the Acting Solicitor General makes no attempt to explain it. *Second*, the Acting Solicitor General seems to contend that Congress must insert in the language of the statute itself not only that the policy is race-conscious, but also that its purpose is to promote programming diversity. But the nature of the distress sale policy, and the relevant legislative history, are quite clear.<sup>2</sup> Unless the Acting Solicitor General is prepared to maintain that the Members of Congress did not understand what they were voting for—and he advances

<sup>2</sup> In fact, the appropriations bills each expressly referred to the distress sale policy, and declared that its purpose was "to expand minority and women ownership of broadcast licenses. . . ." See 162a, 163a, and Appendix to Brief for Petitioner. This language is as plain as it can be; there is no doubt about Congress' intentions.

no such contention—his arguments are simply formalistic, with no basis in policy or in fact.<sup>3</sup>

• The Acting Solicitor General seeks to impugn the factual record on which Congress based its action through various dismissive labels, describing it as “scattered anecdotal testimony” (U.S. Br. 24), “an unfocused gathering of information” (*id.*), and “untested assumptions” (*id.* at 26). It is difficult, to say the least, to discern in these adjectives a workable standard for judicial review of Congress’s factfinding in the course of its legislative function. A court would surely have a difficult time in determining—especially in the delicate task of reviewing how the national legislature had exercised its legislative authority—whether Congress’ factfinding was non-“anecdotal,” or adequately “focused.” In *Fullilove v. Klutznick*, 448 U.S. 448, 475 (1980), this Court required only that Congress possess a “rational basis” in fact for race-conscious remedial legislation. There is no support for the more stringent, albeit unarticulated,

<sup>3</sup> *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989), the sole authority cited by the Acting Solicitor General in support of his contention, has nothing to do with race-conscious legislation, but rather with states’ sovereign immunity under the Eleventh Amendment. In *Dellmuth*, the Court made it clear that the reason for an “unequivocal and textual” declaration by Congress is so that there can be no doubt as to Congress’ intentions. *Id.* at 2401. But it is impossible to read Congress’ enactments regarding the distress sale policy and come away with the slightest doubt as to what was intended. “Against this backdrop of legislative and administrative programs, it is inconceivable that Members of both Houses were not fully aware of the objectives of the MBE provision and of the reasons prompting its enactment.” *Fullilove v. Klutznick*, 448 U.S. 448, 467 (1980).

standard of review that the Acting Solicitor General appears to have in mind.

• The legislative record was far more extensive than the Acting Solicitor General acknowledges, as explained in detail in the Brief of the United States Senate as *Amicus Curiae* in *Metro Broadcasting, Inc. v. FCC*, No. 89-453. As the Court explained in *Fullilove*, “Congress, of course, may legislate without compiling the kind of ‘record’ appropriate with respect to judicial or administrative proceedings.” 448 U.S. at 478. Nor is Congress confined to the perimeters of the legislative record before it regarding the specific legislation at issue; it can also rely on an “historical basis” derived from long experience in the field, a basis that was assuredly present here. *Id.*<sup>4</sup>

<sup>4</sup> Acknowledging that a 1988 report by the Congressional Research Service supports Congress’ conclusion that there is a nexus between minority ownership and diverse programming, the Acting Solicitor General simply dismisses the report on the strength of Judge Williams’ dissenting opinion in *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 358-61 (D.C. Cir. 1989), *cert. granted*, 110 S. Ct. 715 (1990). It is worth noting, however, that in other contexts Judge Williams has been willing to credit studies in the elusive area of broadcast expression even when those studies were based on anecdotal evidence rather than statistically valid sampling.

[I]n the absence of either any statistically valid evidence on the other side, or even a suggestion of how the Commission could have constructed a statistically valid study, we are perplexed as to what the Commission was supposed to have done. Editorial decisions are obviously driven by many factors. Isolation of causes in any scientific way seems virtually impossible.

*Syracuse Peace Council v. FCC*, 867 F.2d 654, 664 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990).

In short, the Acting Solicitor General seeks to impose on Congress an undefined procedural code to test the adequacy of Congress' factfinding when it enacts race-conscious remedial measures. But the Acting Solicitor General has disregarded the Court's admonition that "we must be particularly careful not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981). Congress' factfinding here was unassailable, and the force of its legislative adoption of the distress sale policy must be respected.

### III. THE DEMISE OF THE FAIRNESS DOCTRINE DOES NOT REMOVE THE COMPELLING INTEREST IN DIVERSITY OF EXPRESSION.

The Acting Solicitor General contends that the FCC's abandonment of the fairness doctrine undermines diversity of expression as a compelling governmental interest, because the Commission determined—to be sure, "in another context," U.S. Br. 25—that enough broadcast voices now exist to ensure diversity of expression. The Acting Solicitor General is incorrect; the FCC expressly stated in its fairness doctrine opinions that it was making no such finding.

In *Syracuse Peace Council*, 2 F.C.C. Rcd 5043 (1987), *recons. denied*, 3 F.C.C. Rcd 2035 (1988), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990), the FCC abandoned the fairness doctrine because it concluded that the doctrine inhibited broadcasters from covering controversial public issues, and involved the government intimately in the content of broadcast expression. "Because the net effect of the fairness

doctrine is to reduce rather than enhance the public's access to viewpoint diversity, it affirmatively dis-serves the First Amendment interests of the public." 2 F.C.C. Rcd at 5052.

The FCC made it clear that there were two different concepts of scarcity involved in the issue. The first, which the FCC denominated "numerical scarcity," represented scarcity of broadcast outlets available to the public. It was that sort of scarcity that the FCC believed no longer existed, and that could no longer justify content-based regulation in the form of the fairness doctrine. 2 F.C.C. Rcd at 5054. The second type of scarcity—spectrum (or allocational) scarcity—represented the technical inability of the broadcast spectrum to accommodate every broadcaster who wished to make use of it. The FCC determined that spectrum scarcity remains a fact of life, although the FCC deemed it irrelevant to the constitutionality of the fairness doctrine. *Id.* at 5055. *See also Syracuse Peace Council*, 867 F.2d at 682-83 (Starr, J., concurring).

The FCC carefully explained that the continued existence of spectrum scarcity, though irrelevant to the fairness doctrine, is highly relevant to its licensing function—the function at issue in this case. "That spectrum scarcity should be irrelevant for First Amendment purposes does not affect its relevance to the Commission's allocational and licensing function." 2 F.C.C. Rcd at 5069 n.204. On reconsideration, the FCC reiterated: "Neither [the original] order nor this reconsideration calls into question the constitutionality of our content-neutral, structural regulations designed to promote diversity." 3 F.C.C. Rcd at 2041 n.56.

In short, the Acting Solicitor General has overlooked the FCC's own explicit statements that the increase in the number of broadcast outlets does not affect its duty to allocate the broadcast spectrum to maximize diversity of viewpoint. The compelling interest in allocating broadcast licenses to maximize diversity of expression—the interest that underlies the distress sale policy—is thus undiminished by the Commission's statements in its fairness doctrine opinions.

#### CONCLUSION

For the reasons stated herein, and in the Brief of Petitioner, the decision of the court of appeals should be reversed.

Respectfully submitted,

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### **QUESTION PRESENTED**

Whether the Federal Communications Commission's minority distress sale policy, which permits certain licenses to be transferred only to minority-controlled firms, violates the equal protection component of the Fifth Amendment.

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INTEREST OF THE UNITED STATES

The United States is responsible for enforcing many statutes prohibiting discrimination on the basis of race or national origin (see, e.g., 42 U.S.C. 2000e-5(f)(1)), and may intervene in cases brought under the Fourteenth Amendment (see, e.g., 42 U.S.C. 2000h-2). The United States filed extensive comments with the Federal Communications Commission as part of the inquiry proceeding to consider the validity of its minority preference policies,<sup>1</sup> and has recently filed a brief as amicus curiae in *Metro*

<sup>1</sup> See *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic, or Gender Classifications*, 1 F.C.C. Red 1315 (1986), modified, 2 F.C.C. Red 2377 (1987); J.A. 48-66.

*Broadcasting, Inc. v. FCC*, No. 89-453, a case that involves the validity of one of those policies.<sup>2</sup> In each of these submissions, the United States has maintained that the Commission's policies could not withstand the exacting scrutiny required by the Constitution and this Court's decisions, and were thus invalid. The United States adheres to that position.<sup>3</sup>

### STATEMENT

1. When a television or radio broadcast license has been designated for a revocation hearing, or when a license renewal application has been scheduled for a qualification hearing, the Federal Communications Commission (FCC) generally prohibits the licensee from assigning or transferring the license until the Commission determines whether the licensee remains qualified to hold it. See, e.g., *Northland Television, Inc.*, 42 Rad. Reg. 2d (P & F) 1107, 1110 (1978). The Commission's "distress sale" policy represents an exception to that general rule, "developed initially as a way of avoiding time consuming hearings when expeditious action to oust the licensee was desirable—for example, when the licensee was bankrupt or disabled." Pet. App. 4a-5a; see *Cathryn Murphy*, 42 F.C.C.2d 346 (1973); *La Rose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974).

As originally conceived and implemented, the FCC's distress sale policy was race-neutral. However, as a result of decisions of the District of Columbia Circuit, see, e.g., *TV 9, Inc. v. FCC*, 495 F.2d 929 (1973), cert. denied, 419 U.S. 986 (1974); *Garrett v. FCC*, 513 F.2d 1056 (1975), the FCC supplemented the original policy by adopting a minority distress sale policy. See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 983 (1978) [1978 Policy Statement];

<sup>2</sup> We have provided copies of our brief in *Metro Broadcasting* to each party's counsel in this case.

<sup>3</sup> Given the position of the United States on the question presented, and in order for the Court to have the benefit of the views of the administrative agency involved, the Acting Solicitor General has authorized the Federal Communications Commission to appear before this Court through its own attorneys. See 28 U.S.C. 518(a); 28 C.F.R. 0.20(a).

Minority Ownership Taskforce, FCC, *Minority Ownership in Broadcasting* 1-3, 8-12, 30-31 (1978) [Task Force Report]. That policy permits licensees whose licenses have been designated for a revocation hearing, or whose renewal applications have been designated for a hearing on qualification issues, to transfer or assign the license at a "distress sale" price, but only to applicants who have a significant minority ownership interest and meet other qualifications. *Id.* at 983. The Commission explained that the policy was being adopted because "[f]ull minority participation in the ownership and management of broadcast facilities results in more diverse selection of programming \* \* \* [, and] an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the [broadcast] spectrum." 1978 Policy Statement, 68 F.C.C.2d at 981.<sup>4</sup>

For purposes of the distress sale policy, the Commission defined "minorities" to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." 1978 Policy Statement, 68 F.C.C.2d at 980 n.8. To be eligible to make a distress sale purchase, an applicant must meet the Commission's basic qualifications and have a minority ownership interest that exceeds 50% or is controlling, except that an applicant organized as a limited partnership will be deemed to be one with "significant minority involvement" if there is a general partner who is a minority with a 20% interest in the partnership and who will exercise "complete control over a station's affairs." See *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 853, 855 (1982). To receive Commission approval, the distress sale price must be no higher than 75% of the combined fair market value of the station and license. See *Grayson Enterprises, Inc.*, 47 Rad. Reg. 2d (P & F) 287, 293 (1980).<sup>5</sup>

<sup>4</sup> This programming diversity rationale has also been invoked to support several other FCC policies designed to promote greater minority participation in broadcasting, including the policy of awarding preferences for minority ownership in comparative license proceedings at issue in *Metro Broadcasting v. FCC*, No. 89-453. See U.S. Amicus Br. 3 n.3, *Metro Broadcasting, Inc. v. FCC*, No. 89-453.

<sup>5</sup> From fiscal years 1979 through 1988, the FCC has approved only 38 distress sales. During that same period, the Commission approved a total of approximately 10,000 sales of broadcast stations. See FCC Br. 43-44 & nn.43, 44.

2. The FCC's proceedings at issue here involve the broadcast license for Channel 18 (WHCT-TV), Hartford, Connecticut, held by Faith Center, Inc. After the Commission had designated Faith Center's license renewal application for a hearing, Faith Center twice sought and received the Commission's approval to make a distress sale. See *Faith Center, Inc.*, 88 F.C.C.2d 788 (1981); *Faith Center, Inc.*, 54 Rad. Reg. 2d (P & F) 1286 (1983). In each instance, however, Faith Center was unable to close the transaction. As a result, its renewal application reverted to designated-for-hearing status. Pet. App. 6a-8a, 116a-117a.

In December 1983, respondent Alan Shurberg, the sole owner of Shurberg Broadcasting Company of Hartford, Inc. (collectively "Shurberg"), tendered an application to the FCC for a permit to build a television station in Hartford, an application that was mutually exclusive with Faith Center's pending renewal application for Channel 18. In April 1984, Shurberg asked the Commission to designate that application for a comparative hearing with Faith Center's pending application. In June, however, Faith Center once again sought the Commission's approval to make a distress sale, this time requesting permission to sell to petitioner Astroline Communications Company Limited Partnership, a minority-controlled applicant. Shurberg opposed the distress sale on a number of grounds, including his contention that the Commission's distress sale policy violated his constitutional right to equal protection. Pet. App. 8a-9a.

In December 1984, the FCC approved Faith Center's application for permission to assign its broadcast license to petitioner under the distress sale program. Pet. App. 113a-129a; see *Faith Center, Inc.*, 99 F.C.C.2d 1164 (1984).<sup>6</sup> The Commission rejected Shurberg's constitutional challenge to the minority distress sale program as "without merit," citing the 1978 Policy

<sup>6</sup> The FCC rejected Shurberg's argument that he was entitled to a comparative hearing against Faith Center's renewal application, concluding that the

minority ownership policies, as reflected here in the distress sale proposal, are sufficiently important to warrant maintaining Faith Center's renewal application in hearing status, protected from competing applica-

*Statement*, the *Task Force Report*, and decisions of the District of Columbia Circuit such as *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 609-611 (1984), cert. denied, 470 U.S. 1027 (1985), which have "repeatedly defined as an important public interest objective the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations." Pet. App. 123a. Finally, the Commission concluded that Congress, in requiring that the Commission incorporate "significant preferences for minority applicants" into a random lottery selection scheme for the award of licenses to conduct or operate new stations, see 47 U.S.C. 309(i)(3)(A), has "reaffirmed the importance of fostering minority ownership of broadcast stations." *Ibid.*

Shurberg then filed a petition for review of the Commission's order in the District of Columbia Circuit.<sup>7</sup> Meanwhile, on January 23, 1985, Faith Center and petitioner closed the distress sale. Petitioner bought the Channel 18 license and station assets

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tions, for a sufficient additional time to permit us to consider the pending applications to assign the license to [petitioner].

Pet. App. 121a. The Commission also rejected Shurberg's application for a construction permit because he had not complied with controlling regulations. See 47 C.F.R. 73.3516(e). Lastly, the Commission rejected Shurberg's contention that petitioner was not a bona fide minority-controlled applicant. Pet. App. 125a-126a.

<sup>7</sup> The disposition of Shurberg's appeal was delayed for several years while the Commission began a reconsideration of its minority preference policies. See U.S. Amicus Br. 4-5 n.4, *Metro Broadcasting, Inc. v. FCC*, No. 89-453. In 1987, Congress enacted an appropriations rider that prohibited the Commission from spending any appropriated funds "to repeal, to retroactively apply changes in, or to continue a re-examination of" its minority and female preference policies. Pub. L. No. 100-202, 101 Stat. 1329-31 to 1329-32 (1987). Congress has since extended the prohibition through fiscal years 1989 and 1990. See Pub. L. No. 100-459, 102 Stat. 2216-2217 (1988); Pub. L. No. 101-162, 103 Stat. 1020-1021 (1989). In response to the appropriations rider, the FCC closed its inquiry proceeding and reinstated its policy of preferring minority-controlled applicants in distress sales. See *Order (MM Docket No. 86-484)*, 3 F.C.C. Red 766 (1988). The FCC then reaffirmed its earlier decision in this case approving Faith Center's application for permission to assign its broadcast license to petitioner under the distress sale program. See *Faith Center, Inc.*, 3 F.C.C. Red 866 (1988).

for \$3.1 million; the fair market value of the license and station assets had been appraised at \$6,520,000. See Pet. App. 11a, 30a n.17.

3. In March 1989, a divided court of appeals reversed. Pet. App. 1a-112a.<sup>8</sup> In a brief per curiam opinion, the panel majority held that the Commission's minority distress sale policy "unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote programming diversity." *Id.* at 2a. The court accordingly remanded the case to the Commission for further proceedings. Judges Silberman and MacKinnon, who comprised the panel majority, each filed separate opinions concurring in the judgment. See *id.* at 3a-52a (Silberman, J.); *id.* at 53a-69a (MacKinnon, J.).<sup>9</sup>

In Judge Silberman's view, the Commission sought to justify its minority distress sale program "both as a means to foster diverse programming and as a remedy for past discrimination." Pet. App. 25a. Turning first to the latter justification, he stated that "[n]either Congress nor the FCC ever found any evidence

<sup>8</sup> While the case was pending before the court of appeals, petitioner entered into voluntary reorganization proceedings under Chapter 11 of the Bankruptcy Code. See Order, *In re Astroline Communications Co.*, No. 2-88-01125 (Bankr. D. Conn. Dec. 1, 1988). That bankruptcy proceeding remains pending. Petitioner has informed the FCC that its financial condition and future operation of the television station are uncertain. See *Arnold L. Chase*, 4 F.C.C. Rcd 5085 (1989); see also FCC Br. 16 n.16.

<sup>9</sup> As a threshold matter, Judge Silberman concluded that the Commission had properly applied the governing statute and regulations (47 U.S.C. 307(c); 47 C.F.R. 73.3516(e)) in concluding that Shurberg was not entitled to a comparative hearing. See Pet. App. 13a-17a. Neither Judge MacKinnon nor Chief Judge Wald disagreed with this conclusion.

In addition, Judge Silberman concluded that the Commission had not exceeded its statutory authority under the Communications Act of 1934 when it adopted the minority distress sale policy. See Pet. App. 17a. Judge MacKinnon apparently agreed with this conclusion. See *id.* at 56a ("the case has leveled down to a constitutional attack on the distress sale policy"). Chief Judge Wald addressed the constitutional issue in light of the majority's decision to do so. See *id.* at 72a-73a n.3.

to link minority 'underrepresentation' to discrimination by the FCC or to particular discriminatory practices in the broadcasting industry," *id.* at 27a, and that, in any event, the Commission's program "does not conform to the stricture of the Constitution because it is not narrowly tailored to remedy past discrimination," *id.* at 29a. With respect to the programming diversity rationale, Judge Silberman rejected the proposition that such an interest, in the context of this case, is sufficiently compelling to support the race-based preference. See *id.* at 36a-41a. He noted, among other things, that the Commission, in recently abandoning the "fairness doctrine," had determined "that there is no longer an inadequate diversity of viewpoints in television programming." *Id.* at 40a. Judge Silberman concluded that, in any event, the Commission's distress sale policy was not narrowly tailored to achieve that goal. "As a means to promote diverse programming, the distress sale policy rests on the questionable premise that minority ownership will by itself lead to minority programming (or programming that might be thought to have a minority perspective)." *Id.* at 41a-42a.

Judge MacKinnon concurred in the judgment, concluding that the Commission's minority distress sale program "does not satisfy the 'narrowly tailored' requirement of equal protection analysis." Pet. App. 54a.<sup>10</sup> In his view, "the program is open-ended in that circumstances may cause it to be applied to any broadcast licensee without regard to any past discrimination." *Id.* at 61a. Accordingly, Judge MacKinnon concluded that the program "unduly burdens innocent nonminorities." *Id.* at 66a.

Chief Judge Wald dissented, concluding that the "majority's invalidation of the Commission's ten-year old minority distress sale program \* \* \* impermissibly overturns a considered congressional judgment as to the appropriate means of assuring diversity of viewpoint over the national airwaves." Pet. App.

<sup>10</sup> For that reason, Judge MacKinnon chose not to reach the question "whether either promoting programming diversity or remedying societal discrimination [is] a sufficiently compelling governmental interest to support the use of government sponsored minority preference programs." Pet. App. 60a n.11.

70a. Chief Judge Wald accepted as both reasonable and supported by congressional fact finding the connection between minority ownership and diversity of programming. See *id.* at 92a-100a. She also disputed the conclusion that the Commission's program impermissibly burdens innocent nonminorities, finding that "the very limited circumstances in which the distress sale policy can be invoked, suggest that the burden the policy places on nonminority applicants is acceptable." *Id.* at 109a.<sup>11</sup>

### SUMMARY OF ARGUMENT

I. The FCC's policy classifies on the basis of race and is therefore constitutionally suspect. In *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), five Members of the Court concluded that a state or local government's use of a racial classification is subject to "strict scrutiny," that is, the racial classification must be "narrowly tailored" to achieve a "compelling governmental interest." In our view, a racial classification adopted by the federal government, no less than a state or local government, should be subject to the same exacting standard of review. In deciding whether a federal preference program is designed to achieve a compelling governmental interest, a determination made by Congress that there is a need for remedial race-conscious action should be entitled to significant deference. This additional measure of deference is appropriate, however, only if Congress itself makes the critical determination that such a program is required, and only if this determination has a demonstrable basis in fact. And any such racial classification must be narrowly tailored to achieve the compelling governmental interest identified by Congress.

II. A. This Court has endorsed only one sufficiently compelling justification for a racial classification: remedying the ef-

<sup>11</sup> The court of appeals later denied petitions for rehearing, together with suggestions of rehearing en banc, filed by both petitioner and the FCC. Pet. App. 143a-154a; *id.* at 155a-160a. Chief Judge Wald, joined by Judges Robinson, Mikva, Edwards, and Ruth B. Ginsburg, dissented from the denial of rehearing en banc. *Id.* at 155a-160a.

fects of identified present or past racial discrimination. That justification, however, may not be invoked to uphold the preference policy at issue. First, Congress has not specifically mandated that the Commission adopt or maintain the minority distress sale policy in order to remedy prior discrimination. Second, even if Congress could somehow be viewed as having advanced a remedial justification, it cannot be said that Congress had sufficient evidence before it of prior discrimination in the broadcasting industry—let alone in the awarding of broadcast licenses—to justify race-conscious relief. Third, the FCC, the agency that authored the "policy" Congress has frozen, has consistently taken the position that its policy is *not* designed to remedy prior discrimination in the broadcasting industry. And finally, the amorphous notion of prior "societal discrimination" may not serve as an adequate substitute justification.

Even if it could be said that the FCC's preference policy was adopted to remedy prior identified discrimination, it is plainly not "narrowly tailored" to achieve that alleged purpose. Neither Congress nor the Commission has adequately considered, much less tried, less intrusive race-neutral means to increase minority ownership of broadcasting licenses. Moreover, the minority distress sale policy is not aimed at correcting the actual effects of past discrimination, but instead reflexively confers an exclusive governmental benefit on all who possess the requisite skin color or ethnic background.

B. The second asserted justification for the minority distress sale policy is to further diversity of programming. But this Court has never held that such a quest for programming diversity is a sufficiently compelling justification for the government's use of a racial classification, and there is reason to question whether that justification—as applied to the public broadcasting spectrum—would so qualify. The idea that the government has a compelling interest in promoting viewpoints identified with specific racial or ethnic groups is deeply troubling, and appears to boil down to the type of racial stereotyping that is anathema to basic constitutional principles.

Moreover, even if programming diversity could count as a compelling governmental interest, neither Congress nor the FCC has established the factual predicates necessary to support the use of racial classifications to promote programming diversity. The legislative history shows at most that Congress relied on untested assumptions—about the existence of distinct “minority” viewpoints, about whether those viewpoints are underserved by today’s broadcasting industry, and about whether increasing minority ownership would translate into more “minority” programming. Nor does the administrative history of the FCC’s policy offer anything to shore up this inadequate factual record.

Putting aside the evidentiary difficulties with the “programming diversity” rationale, the FCC’s policy is not “narrowly tailored” to accomplish that asserted goal. The policy’s goal—diverse programming—is too indeterminate to allow either the Commission or any reviewing court to know whether it has ever been attained.

C. Finally, other novel justifications now advanced by the Commission and certain amici in support of the distress sale policy fare no better under the pertinent constitutional analysis. Apart from the fact that none of these new justifications <sup>has</sup> been expressly invoked by Congress or previously relied upon by the FCC, each suffers from many of the same analytical deficiencies as the remedial and programming diversity theories. And the continued search at this late stage for an alternative rationale only reinforces the conclusion that the Commission’s minority preference policies—inherently suspect because they classify on the basis of race and ethnic background—are policies in search of an adequate supporting justification.

## ARGUMENT

### THE FEDERAL COMMUNICATIONS COMMISSION’S MINORITY DISTRESS SALE POLICY, WHICH PERMITS CERTAIN LICENSES TO BE TRANSFERRED ONLY TO MINORITY-CONTROLLED FIRMS, VIOLATES THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

#### I. Classifications By The Federal Government On The Basis Of Race May Be Sustained Only If “Narrowly Tailored” To Achieve A “Compelling” Interest

A. The federal policy at issue in this case provides a valuable government benefit to applicants for broadcast licenses, but only if they are Black, Hispanic, Oriental, Indian, Eskimo, or Aleutian. It plainly classifies on the basis of race and thus conflicts with the fundamental principle embodied in the guarantee of equal protection that skin color and ethnic origin are generally inappropriate bases upon which to rest official distinctions between people. *Brown v. Board of Educ.*, 347 U.S. 483, 493-495 (1954); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954); *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880).

In *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), five Members of the Court concluded that a state or local government’s use of a racial or ethnic classification is subject to “strict scrutiny,” that is, the classification must be “narrowly tailored” to achieve a “compelling governmental interest.” *Id.* at 720-721 (1989) (opinion of O’Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.); *id.* at 735 (Scalia, J., concurring in the judgment). The first part of that constitutional analysis focuses on the asserted “compelling governmental interest” supporting the questioned classification, and involves two related inquiries: identifying the interest and determining whether it has a sufficient basis in fact. A majority of the Court has thus far endorsed only one justification for a racial classification that may in appropriate circumstances be sufficiently compelling: the government’s interest “in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination,” *Regents of the University of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). See

*Croson*, 109 S. Ct. at 721-723 (plurality opinion); *id.* at 743-745 (Marshall, J., dissenting); *Roberts v. United States Jaycees*, 468 U.S. 609, 624-625 (1984); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion).<sup>12</sup> The Court has also established that there must be a "strong basis in evidence for [the government's] conclusion that remedial action was necessary." *Croson*, 109 S. Ct. at 724 (opinion of the Court) (internal quotation marks and citation omitted); see also *id.* at 727; *Wygant*, 476 U.S. at 277 (plurality opinion); *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment). In other words, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Croson*, 109 S. Ct. at 724 (opinion of the Court) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533-535 (1980) (Stevens, J., dissenting)).

The second part of the constitutional analysis focuses on whether a racial classification is "narrowly tailored" to promote the compelling governmental interest. In this regard, two factors were singled out by a majority of the Court in *Croson* and are particularly significant: (1) whether alternative race-neutral remedies were considered before resorting to race-conscious measures, see, e.g., *Croson*, 109 S. Ct. at 728; *Wygant*, 476 U.S. at 283 (plurality opinion); *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring), and (2) whether the racial preference is limited to those who have in fact suffered the discrimination the program is designed to remedy. See, e.g., *Croson*, 109 S. Ct. at 728-729; *id.* at 734 (Stevens, J., concurring); *United States v. Paradise*, 480 U.S.

<sup>12</sup> In addition, individual Members of the Court have suggested or found that the promotion of "racial diversity" may be a sufficiently compelling justification for the government to impose race-based measures, at least in the context of promoting a diverse student body or a diverse faculty in higher education. See *Bakke*, 438 U.S. at 311-315 (opinion of Powell, J.); *Wygant*, 476 U.S. at 306 (Marshall, J., dissenting); *id.* at 315-317 (Stevens, J., dissenting); see also *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment).

149, 171 (1987) (plurality opinion); *Wygant*, 476 U.S. at 276 (plurality opinion); *Fullilove*, 448 U.S. at 480-482, 486-488 (opinion of Burger, C.J.); *id.* at 510 (Powell, J., concurring). The Court has identified other factors relevant to the "narrow tailoring" inquiry as well, such as the flexibility and planned duration of the remedy, and the effect of the classification on innocent third parties. *Wygant*, 476 U.S. at 282-283 (plurality opinion); *id.* at 287 (O'Connor, J., concurring in part and concurring in the judgment); *Fullilove*, 448 U.S. at 514-515 (Powell, J., concurring).

B. For the reasons detailed in our brief submitted as amicus curiae in *Metro Broadcasting, Inc. v. FCC*, No. 89-453 (at 12-17), racial classifications adopted by the federal government must also withstand the "strict scrutiny" standard applied to those adopted by state and local governments. Like any racial classification, a federal preference program must be designed to achieve a compelling governmental interest. In deciding whether such an interest exists, a determination made by Congress that there is a need for remedial race-conscious action is entitled to significant deference. But this additional deference is appropriate only if Congress itself makes the critical determination that such a program is required, and only if this determination has an adequate basis in fact. And any such racial classification must be narrowly tailored to achieve the compelling interest identified by Congress.

## II. The Federal Communication Commission's Minority Distress Sale Policy Is Not "Narrowly Tailored" To Achieve A "Compelling" Interest

The initial question presented by this case, therefore, is whether any "compelling" governmental interest may be found to justify the FCC's minority distress sale policy, a policy that permits certain licenses to be transferred only to minority-controlled firms. The second question is whether that policy is "narrowly tailored" to achieve the identified compelling governmental purpose. The Commission's policy fails on both scores.

A. 1. So far, this Court has endorsed only one sufficiently compelling justification for a racial classification, namely, remedying the effects of identified present or past racial discrimination. See pp. 11-12, *supra*. Although petitioner acknowledges (Br. 43) that "the principal goal of the distress sale policy is to promote diversity of expression, not to remedy prior discrimination," both petitioner (Br. 26-27 n.11) and the Commission (Br. 21-28) also argue that the distress sale policy may be sustained as an exercise of Congress's power to remedy prior discrimination.<sup>13</sup> For reasons set forth more fully in our brief in *Metro Broadcasting* (at 18-23), we do not believe that asserted interest may be invoked here.

First, Congress has not specifically mandated through appropriate statutory language that the Commission adopt or maintain the minority distress sale policy in order to remedy prior discrimination. See U.S. Amicus Br. 14-15, *Metro Broadcasting, Inc. v. FCC*, No. 89-453. The lottery statute, 47 U.S.C. 309(i)(3)(A), by its terms directs the FCC to adopt a minority preference only when awarding an initial license or construction permit "through the use of a system of random selection." *Id.* 309(i)(1). It does not purport to authorize the use of preferences under the distress sale policy. And the appropriations riders, which provide that the FCC is not to spend appropriated funds

<sup>13</sup> As we explained in our brief in *Metro Broadcasting* (at 22, 27-28), the FCC has consistently taken the position that its preference policies are *not* designed to remedy prior discrimination in the broadcasting industry. In this case, for example, the Commission stated in the court of appeals that its "minority ownership policies are based principally on the Commission's authority under the Communications Act to encourage diversity of programming on broadcast stations. The FCC's primary goal is not to remedy past discrimination." FCC C.A. Br. 29-30; J.A. 99-101; see Pet. App. 25a, 79a. As we understand the argument in its brief in this Court, the Commission does not retreat from its previously documented position regarding *its own* rationale for these policies, but simply asserts the remedial justification as one purportedly advanced by Congress. See Br. 21-31. The Commission does suggest in passing (Br. 30-31) that its otherwise "justifiable efforts" in regulating the broadcasting industry may have inadvertently hampered minority ownership of stations. That unsupported assertion is scarcely tantamount to a confession of prior discriminatory conduct, nor do any such inadvertent effects amount to unconstitutional discrimination of the sort that might justify race-conscious remedial action.

during a given fiscal year "to repeal, to retroactively apply changes in, or to continue a re-examination of [the Commission's minority distress sale policy]," 101 Stat. 1329-31 to 1329-32; 102 Stat. 2216-2217; 103 Stat. 1020-1021, by their terms only direct that the status quo be maintained with respect to *the Commission's* policies — policies that have previously been understood to be grounded in the "programming diversity" rationale, rather than in any finding of prior discrimination. See note 13, *supra*; FCC Br. 32-34.<sup>14</sup>

Nor do the legislative histories of these provisions show that Congress harbored any specific intention to require — or endorse — Commission action to remedy prior discrimination by means of a distress sale policy. The history of the appropriations riders suggests that Congress understood the FCC's distress sale policy to be grounded in the programming diversity justification, not an anti-discrimination rationale. See U.S. Amicus Br. 20, 25-26, *Metro Broadcasting v. FCC*, No. 89-453.

<sup>14</sup> Although both the Commission (Br. 28-31) and petitioner (Br. 26-27 n.11) suggest that the lottery statute and the appropriations riders may be regarded as an exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment, neither party adequately explains how Section 5 can be applied to address alleged discrimination in an area regulated by the federal government. Section 5 gives Congress power to legislate only with respect to Section 1 of the Fourteenth Amendment, which in turn is concerned with *state* as opposed to federal action. See U.S. Amicus Br. 18 n.10, *Metro Broadcasting v. FCC*, No. 89-453. The only way to attribute ownership patterns in the broadcasting industry to state discrimination would be to adopt a theory of "societal discrimination" that is so amorphous it would effectively eliminate any distinction between remedial and nonremedial racial classifications. See pp. 17-19, *infra*.

This case therefore differs from *Fullilove*, where Congress could be said to be acting under Section 5 to rectify past discrimination in the awarding of public works contracts by the States. In any event, the Court need not reach the broader question whether Congress would have the power to adopt remedial race-conscious legislation for the broadcasting industry under Section 5 of the Fourteenth Amendment (or for that matter, under Section 2 of the Thirteenth Amendment, see *Jones v. Alfred H. Mayer & Co.*, 392 U.S. 409 (1968), which neither petitioner nor the FCC claims), since in our view it is clear that Congress has not attempted to do so with the requisite specificity or with the kind of supporting evidence required by *Fullilove*.

When Congress has enacted racial preferences that appear to be consistent with the standards set forth herein, the United States has defended such legislation against constitutional challenges. See, e.g., *Carpenter v. Thornburg*, No. 88-3578 (4th Cir. Jan. 16, 1990).

And although the conference committee report on the legislation that adopted the lottery provision mentions a possible remedial justification in passing, H.R. Conf. Rep. No. 765, 97th Cong., 2d. Sess. 43 (1982), this reference—which was directed to a different preference program—cannot, as the Commission suggests (Br. 22-23, 24, 27, 28), substitute for an express congressional directive to maintain the distress sale policy in order to overcome past discrimination.

Second, even if Congress could somehow be viewed as having adopted a remedial justification, Congress did not have sufficient evidence before it of prior discrimination in the broadcasting industry to justify race-conscious relief. See, e.g., *Croson*, 109 S. Ct. at 727 (opinion of the Court); *Wygant*, 476 U.S. at 277 (plurality opinion); *Fullilove*, 448 U.S. at 533-535 (Stevens, J., dissenting). To the contrary, as Judge Silberman correctly observed, Pet. App. 28a-29a, there can be no claim based on the sparse legislative history of the appropriations riders that Congress had before it evidence suggesting that minorities have been denied effective participation in the broadcasting industry either because of official or private acts of discrimination. This is rather a case like *Croson*, in which “[t]here is nothing approaching a prima facie case of constitutional or statutory violation by *anyone*” in the broadcasting industry. 109 S. Ct. at 724 (opinion of the Court).

Nor does the bare mention of a possible remedial justification in the legislative history of the lottery program constitute the kind of factual predicate necessary to sustain the use of a racial classification. Compare *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.) (relying on extensive legislative history of related legislation). To begin with, the relevant statement—the “Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in severe underrepresentation of minorities in the media of mass communications \* \* \*,” H.R. Conf. Rep. No. 765, *supra*, at 43—carefully avoids asserting that there in fact has been any discrimination in the broadcasting industry. Rather, it speaks of “underrepresentation” of minorities in “media of mass communications” (not explicitly broadcasting), resulting from

“the effects of past inequities,” which in turn have “stemmed” from racial and ethnic discrimination. The statement therefore at most asserts that generalized societal discrimination has had an effect on the communications industry, not unlike the effect such discrimination would have across the board; it does not make any finding of past discrimination in broadcasting or by the FCC. This is confirmed by an earlier conference report, which described the rationale for the lottery preference in this way:

It is the firm intention of the conferees that ownership by minorities, such as blacks and hispanics, \* \* \* and ownership by other underrepresented groups, such as labor unions and community organizations, is to be encouraged through the award of significant preferences in any such random selection proceeding. These are the groups which are inadequately represented in terms of nationwide telecommunications ownership, and it is the intention of the conferees \* \* \* that the objective of increasing the number of media outlets owned by such persons or groups be met.

H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981). This statement makes no mention of discrimination at all. Thus, it is far from clear whether the conferees, in calling for a racial preference in a lottery system, were focusing on the need to remedy identified discrimination in the broadcast industry, or were simply intent on increasing minority ownership of broadcast licenses for its own sake—a clearly impermissible governmental objective. See p. 19, *infra*.

Given this legislative record, it is not surprising that the Commission (Br. 30-31) and amici (e.g., Congressional Black Caucus, et al., Br. 18-24), frankly seek to justify the preference policies as an effort to remedy prior “societal discrimination.” This Court has tended to view such arguments with great caution, see *Croson*, 109 S.Ct. at 723 (plurality opinion); *Wygant*, 476 U.S. at 276 (plurality opinion); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.), and with good reason. The type of “societal discrimination” invoked by the Commission and others

operates at such a diffuse level that it would justify the use of racial preferences in virtually every aspect of organized social life. The inherently suspect nature of racial classifications requires a more focused and meaningful inquiry. In this case, for example, no one maintains that the Commission has discriminated against minorities in awarding broadcast licenses. And although the contention is made that the original allocation of broadcast licenses occurred at a time when "most licenses [were] awarded to white males," ACLU Amicus Br. 19, this hardly amounts to proof or even an assertion of prior discrimination, and does not mean that the original allocation has remained frozen since then or that later changes in the allocation were infected by discrimination. Any such claim ignores the realities of the modern broadcasting industry, where it appears that roughly 1000 radio stations and 250 television stations (approximately 9% of all broadcast stations) are sold each year.<sup>15</sup> Thus, as long as there is no discrimination today in the broadcast industry, minority groups should have the same opportunity to obtain broadcast licenses as nonminorities do. To the extent they do not or cannot avail themselves of that equal opportunity, it is not because of discrimination in the broadcast industry or by the FCC.

It follows that the "societal discrimination" advanced in this case boils down to the proposition that, because of past discrimination, Blacks and other minority groups have, on average, accumulated fewer of the skills and resources needed to acquire the financing and prior experience necessary to secure a broadcasting license than, again on average, nonminorities have. But this type of societal discrimination is so "amorphous," *Wygant*, 476 U.S. at 276 (plurality opinion), that it would justify the use of racial preferences in virtually any business where there is "underrepresentation" of minorities. Moreover, it would seemingly require that those preferential policies remain

<sup>15</sup> These figures are based on the FCC's estimate that approximately one-half of all transfer applications approved each year reflect station sales (as opposed to reorganizations), and on averages over the past 10 years. See Broadcast/Mass Media Application Statistics, FCC Ann. Rep. (Fiscal Years 1979-1988).

in effect until all racial and ethnic groups have reached exact "parity" in every industry or segment of society. If racial preferences can be justified by "discrimination" identified at this level of abstraction, then any meaningful distinction between legitimate remedial action and preferences for preferences sake would disappear.

The FCC has avoided suggesting that it may seek to promote diverse ownership as an end in itself. As Justice Powell stated, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307; accord *Croson*, 109 S. Ct. at 721 (plurality opinion); *id.* at 730-734 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 735, 739 (Scalia, J., concurring in the judgment). Nevertheless, given the inadequate supporting record and the confused state of affairs surrounding its preference policies, the Commission may well be pursuing just that sort of impermissible endeavor.

2. Even if it could be said that the FCC's minority distress sale policy was adopted to remedy prior identified discrimination, it is plainly not "narrowly tailored" to achieve that alleged purpose.<sup>16</sup> First, neither Congress nor the Commission has adequately considered less intrusive race-neutral means to increase minority ownership of broadcasting licenses. See, e.g., *Croson*, 109 S. Ct. at 728; *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring). The FCC (Br. 38-39) suggests that recent efforts to increase the total number of radio and television stations and to relax certain financial requirements for prospective license holders show that it has considered race-neutral measures to remedy the effects of prior discrimination. But it is implausible to regard these as steps taken to rectify prior discrimination, since the Commission itself has never regarded the lack of minority ownership of

<sup>16</sup> Petitioner contends (Br. 27-29) that the Court should defer to the choice of race-conscious measures adopted by the Congress and the Commission. For the reasons explained in our brief in *Metro Broadcasting* (at 15-17), the Court has already eschewed such an approach.

broadcasting licenses to be the result of discrimination in the broadcasting industry. See p. 14 & note 13, *supra*. In any event, with one exception,<sup>17</sup> these measures were not designed to increase diversity of ownership of broadcast licenses, as opposed to increasing diversity of programming, and thus they have no nexus to the stated rationale.

Second, the minority distress sale policy is not aimed at correcting the actual effects of past discrimination. See, e.g., *Croson*, 109 S. Ct. at 728-729; *id.* at 734 (Stevens, J., concurring in part and concurring in the judgment); *Paradise*, 480 U.S. at 171 (plurality opinion); *Fullilove*, 448 U.S. at 480-482, 486-488 (opinion of Burger, C.J.); *id.* at 510 (Powell, J., concurring). In particular, the policy, as applied, does not permit an inquiry to determine whether any particular minority applicant was in fact not disadvantaged by past discrimination. As Judge Silberman observed, the distress sale policy "in no way require[s] the preference to be tied to the disadvantage suffered by the minority enterprise. There is no opportunity here to ensure that participating minority enterprises have actually been disadvantaged by past discrimination or its effects." Pet. App. 30a; see *id.* at 61a-63a (MacKinnon, J., concurring in the judgment).

The Commission (Br. 42-46) and petitioner (Br. 30-39) take pains to point out that the distress sale policy, which in practice applies in a relatively narrow set of circumstances (see pp. 2-3, *supra*), has accounted for only 38 sales over the past decade—a period during which the Commission approved approximately 10,000 sales of broadcast stations (see note 5, *supra*). But the fact that explicit consideration of race or ethnic background is limited to a few cases does not mean that such consideration is "narrowly tailored" in a constitutionally relevant sense. For example, it does not mean that the policy will be applied only to those who are truly disadvantaged or only when it will not injure innocent third parties. As this case makes plain, minority

<sup>17</sup> The Commission's "procedures to disseminate more widely information about the availability of potential minority buyers of broadcast stations" (FCC Br. 39) would appear to be an effort to increase minority ownership of licenses, as opposed to minority-oriented programming.

ownership is the determinative factor in the Commission's approval of the distress sale, whether or not the applicant can show that the particular minority owner has been disadvantaged.<sup>18</sup> As Judge Silberman noted, the FCC's policy can clearly injure third parties: "It is a Hartford station Shurberg wants and, after all is said and done, he has been absolutely denied an opportunity to compete for one merely because of his race." Pet. App. 35a; see *id.* at 66a-68a (MacKinnon, J., concurring in the judgment).<sup>19</sup> Finally, the fact that the Commission may have discriminated on the basis of race or ethnic origin only 38 times in the past decade through this program is in any event a curious defense of that program's legitimacy.

B. 1. The second asserted justification for restricting access to the distress sale program on the basis of skin color and ethnic background—and the one on which the Commission (Br. 23-24, 32-34, 35-38) and petitioner (Br. 19-26) principally rely—is to further diversity of programming. As we pointed out in our brief in *Metro Broadcasting* (at 24), this asserted justification is clearly different from any of the rationales previously considered by this Court in support of minority preference programs. As we also noted, there is reason to question whether this justification, as applied to the public broadcast spectrum, qualifies as "compelling."

a. There can be no doubt that promoting diversity of opinion and viewpoints is a legitimate governmental interest, sufficient to sustain content-neutral and race-neutral measures that do not infringe on fundamental constitutional rights. See *Associated Press v. United States*, 326 U.S. 1 (1945) (upholding application of the antitrust laws to the news media); *FCC v. Na-*

<sup>18</sup> Indeed, in light of certain factual allegations raised by Shurberg, see, e.g., Br. in Opp. 6-9; J.A. 68-69, there appear to be doubts regarding the propriety of characterizing petitioner as "minority-controlled" by virtue of having Mr. Ramirez as a general partner.

<sup>19</sup> For this reason, the Commission's observation (Br. 44) that a nonminority applicant can overcome the distress sale preference by filing a timely application for a mutually exclusive license merely shows that the distress sale program is likely to affect only a small number of cases. It does not establish that the program, where it does apply, is narrowly tailored.

*tional Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding FCC rules limiting cross-ownership of broadcast licenses and newspapers in the same community); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding FCC rules limiting the total number of stations in any service area that a person may own or control). With respect to the newsprint media, however, this Court has held that the promotion of diverse viewpoints is *not* sufficiently compelling to justify coercive governmental measures that interfere with the First Amendment rights of newspaper publishers. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248 (1974). The Court had previously reached a contrary conclusion with respect to the broadcast media in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), but did so largely because of factual circumstances—a perceived scarcity of broadcast outlets—that the Commission has recently determined no longer exists. See pp. 25-26, *infra*. It is thus far from clear that the interest in promoting “programming diversity” is sufficiently compelling to justify the use of racial classifications that would otherwise infringe upon equal protection rights.

The idea that the government has a compelling interest in promoting viewpoints identified with specific racial or ethnic groups is also deeply troubling. The proposition that certain minority groups have distinctive tastes and preferences in programming, and that minority owners will be more disposed than nonminority owners to offer such programming, have not been demonstrated by credible empirical evidence. See pp. 23-25, *infra*. But even if they were, it is quite another thing for the government to adopt an official *presumption* that the color of a person’s skin or his ethnic background will predict the way he will think and act. These types of presumptions—usually referred to as stereotypes—“carry a danger of stigmatic harm” and “may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” *Croson*, 109 S. Ct. at 721.<sup>20</sup>

<sup>20</sup> Petitioner’s submissions to the Commission regarding its proposed “minority programming” appear to confirm that these types of race-conscious preferences may lead to stereotyping. See, e.g., J.A. 24-27, 31-33.

b. Even if programming diversity might in theory qualify as a compelling governmental interest, there are other reasons why it cannot sustain the Commission’s distress sale policy. As in the case of the FCC’s comparative license preference policy (U.S. Amicus Br. 25-26, *Metro Broadcasting, Inc. v. FCC*, No. 89-453), Congress has never adopted legislation that expressly directs the FCC to adopt a distress sale policy in order to promote programming diversity. The most that can be said is that there are expressions in the legislative history of the appropriations riders indicating that individual members of Congress approved of that policy. See, e.g., S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987); 134 Cong. Rec. S10,021 (daily ed. July 27, 1988) (statement of Sen. Hollings); 133 Cong. Rec. S14,395 (daily ed. Oct. 15, 1987) (statement of Sen. Lautenberg). But when Congress seeks to require the use of racial classifications that would otherwise violate equal protection, it must make its intention “unmistakably clear in the language of the statute.” *Dellmuth v. Muth*, 109 S. Ct. 2397, 2400 (1989) (citation omitted). A bland directive in a massive appropriations rider that by its terms merely directs that no money be spent during the fiscal year to change the status quo does not satisfy this requirement. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114-116 (1976); see also *TVA v. Hill*, 437 U.S. 153, 190-191 (1978).

c. In any event, even if it could be said that Congress had expressly directed the Commission to award minority preferences in order to enhance programming diversity, it cannot be said that Congress had an adequate basis in fact to justify such action. In order to demonstrate the need for racial preferences on this rationale, it would be necessary to show: (1) that different racial or ethnic groups have distinctive listening or viewing tastes; (2) that one or more of these distinctive racial or ethnic tastes are being undersupplied by today’s broadcasting industry; and (3) that increasing the percentage of minority owners would overcome the shortage of programming that serves these distinctive tastes. See *Winter Park Communications v. FCC*, 873 F.2d 347, 358 (D.C. Cir. 1989), cert. granted, 110 S. Ct. 715 (1990) (Williams, J., dissenting). To the extent

that Congress even perceived the need to resolve these questions, however, it merely assumed the answers. See Pet. App. 46a.

The FCC (Br. 9-10, 36-37) and petitioner (Br. 45-47) point out that there is scattered anecdotal testimony offered by various individuals and interest groups in congressional hearings that might support one or more of these propositions.<sup>21</sup> But where, as here, Congress has not affirmatively enacted legislation based on any finding that race is a reliable proxy for programming choices, such an unfocused gathering of information is an inadequate basis for invoking an otherwise suspect racial classification.

The Commission also suggests (Br. 26, 36 n.32) that Congress could have properly relied on a recent report filed by the Congressional Research Service that purports to document a correlation between minority ownership and diverse programming. Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (June 29, 1988). But that report is so fundamentally flawed as to deprive it of any significance. For example, it fails even to define "minority programming," and it fails to take into account the possible differences in the racial composition of various station owners' audiences. See *Winter Park Communications*, 873 F.2d at 358-361 (Williams, J., dissenting). In any event, apart from one passing reference to that report in the pertinent legislative record, see 134 Cong. Rec. S10,021 (daily ed. July 27,

<sup>21</sup> See *Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (1989) [1989 Hearing]; *Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media: Hearing on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983).

1988) (statement of Sen. Hollings), there are no indications that Congress even considered, let alone accepted, the tentative findings in the CRS survey in connection with maintaining the appropriations provision blocking the FCC's inquiry proceeding.<sup>22</sup>

Finally, the Commission (Br. 2, 26-28, 36-37) and petitioner (Br. 45-47) contend that Congress could have relied on conclusions reached in the *Report of the National Advisory Commission on Civil Disorders* (1968), and the United States Civil Rights Commission's monographs, *Window Dressing on the Set: Women and Minorities in Television* (Aug. 1977), and *Window Dressing on the Set: An Update* (Jan. 1979). But those reports, by their terms, do not even purport to show that race is a reliable proxy for programming choices.

Each of the foregoing sources of supposed factual support for the programming diversity rationale also suffers from a more fundamental shortcoming. Neither petitioner, nor the Commission, nor any of the supporting amici, explain why the conclusions reached in the various studies—some of which are more than two decades old—have any continuing relevance when the Commission itself has determined in another context that fundamental changes in the broadcasting industry have eliminated the need for intrusive government regulation in order to ensure "programming diversity." Specifically, because of increased numbers of broadcast outlets, and the introduction of cable television and other new technologies, the Commission has decided to abandon the "fairness doctrine," noting that there are now a "sufficient number of over-the-air television and radio voices to insure the presentation of diverse opinions on issues of public importance." *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 208 (1985); see *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 717 (1990). As the Commission has previously recognized, these fundamental

<sup>22</sup> Indeed, Senator Inouye, a leading proponent of the Commission's minority preference policies, recently acknowledged that Congress "need[s] to demonstrate that minority . . . ownership of broadcast stations does, in fact, promote diversity in the views presented on the airwaves." 1989 Hearing at 2.

changes in the broadcasting industry also call into question the need for special policies regarding minority ownership designed to enhance programming diversity.<sup>23</sup>

If the record before Congress fails to disclose any factual support for the programming diversity theory, neither does the administrative history of the FCC policy offer anything to fill "this evidentiary void." *Winter Park Communications*, 873 F.2d at 358 (Williams, J., dissenting). The Commission initially adopted its policy not after any careful study of the need for additional programming diversity and the relationship between ownership and programming, but rather at the direction of the court of appeals for the District of Columbia Circuit. See pp. 2-3, *supra*. The court of appeals, in turn, merely assumed that there was inadequate "minority" programming, and that increased minority ownership would rectify this shortcoming. See *Garrett*, 513 F.2d at 1063.

The administrative record compiled by the Commission, such as it is, confirms that the Commission also acted on the basis of untested assumptions.<sup>24</sup> In fact, the Commission has candidly admitted the lack of an evidentiary predicate for the preference policy. In 1986, the FCC conceded that no Commission proceeding establishes as a fact that

<sup>23</sup> The Commission has recognized that those changes in the marketplace have resulted in [a] \* \* \* rich array of information and entertainment programming, and, further, that this phenomenon of increased competition driving increased program diversity will continue. These findings demonstrate that in the current environment there is little if any basis to assume that racial or gender preferences are essential to the availability of minorities' or women's viewpoints. Thus, rather than there being a record to demonstrate that these preferences are essential, what record is available suggests otherwise.

Brief for FCC on Rehearing En Banc at 26-27, *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985).

<sup>24</sup> For example, the 1978 Policy Statement, 68 F.C.C.2d at 981, quotes the *Task Force Report*. The *Task Force Report*, in turn, expressly relies on decisions such as *TV 9* and *Garrett* for its endorsement of the proposition that increased minority ownership will promote "greater diversity in the media." *Task Force Report* at 4; see *id.* at 4-6.

the race \* \* \* of an owner necessarily has a direct nexus to program content. \* \* \* The substantial deference normally accorded the Commission's judgmental and predictive determinations cannot justify reliance on suspect classifications to enhance program diversity in the absence of a clear and specific foundation upon which to base its conclusion. Here the agency needs a factual basis to support the assumed nexus, but none has ever been established.

Brief for FCC on Rehearing En Banc at 27-28, *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985). It was precisely for that reason that the Commission initiated its inquiry proceeding in December 1986. See note 1, *supra*. Congress, however, terminated that investigation, see note 7, *supra*, and thus the Commission has been unable to determine whether the asserted purpose of the minority preference policy has any factual support either now or over a decade ago when it was first adopted. Congress cannot simultaneously purport to rely on the "findings" of an administrative agency and yet prohibit that agency from engaging in a more complete inquiry to determine the actual facts.

2. Putting aside the evidentiary difficulties with the "programming diversity" rationale, that policy is not "narrowly tailored" to accomplish the asserted goal. The policy's goal—diverse programming—is too indeterminate to allow either the Commission or any reviewing court to know whether it has ever been attained. This Court has made clear that such a feature, which renders the preference policy potentially "ageless in [its] reach into the past, and timeless in [its] ability to affect the future," *Wygant*, 476 U.S. at 276 (plurality opinion), precludes the use of a racial classification. See, e.g., *Croson*, 109 S. Ct. at 723 (plurality opinion); *Paradise*, 480 U.S. at 171 (plurality opinion). As Judge MacKinnon observed, "because the distress sale program has no limits of any character it is not sufficiently tailored to the goal of promoting programming diversity. Compliance is voluntary and the program contains no assurance that any programming diversity will be achieved. Thus, the FCC, subject only to the broad public interest standard, has unfettered discretion in approving distress sales." Pet. App. 63a-64a (footnote omitted).

C. Implicitly acknowledging that neither the remedial justification nor the programming diversity justification will bear scrutiny, the Commission and certain amici also advance certain other, novel justifications for the FCC's minority programs.<sup>Preference</sup> None of these new justifications has been expressly invoked by Congress, nor has any been previously relied upon by the FCC. Thus, for the reasons noted above and in our brief in *Metro Broadcasting* (at 14-15, 19, 22, 25-26), they would not be entitled to any additional deference in determining whether the use of a racial classification is permissible. In any event, they suffer from many of the same analytical deficiencies as the remedial and programming diversity theories.

The Commission (Br. at 30) suggests that "[b]roadcasting, unlike other industries, such as the construction industry in *Fullilove* and *Croson*, involves the use of a unique, limited resource pursuant to a system of government licensing." But all resources subject to government licensing are "unique." This attribute, by itself, cannot distinguish FCC broadcasting licenses from offshore oil drilling permits, or patents, or airport landing rights. If the Commission means to suggest that broadcasting licenses are of "unique" public importance, the only apparent reason why this would be so would be because broadcasting supplies information and opinion to the public; if this is the underlying reason, however, then the unique resource notion collapses into a version of the programming diversity argument. In any event, there is no reason why this "unique resource" should be, as the Commission suggests (Br. at 31), subject to "[e]ntrenched ownership patterns." As long as broadcast licenses are freely bought and sold in the secondary market — as the Commission's own data show they are — then it is hard to see why a minority preference program is necessary to modify the distribution of broadcasting licenses that existed when the industry was in its infancy.

Certain amici (ACLU Br. at 9) suggest what they call a "structural" justification for the FCC preference programs, based on an alleged "need to repair the damaged institution through the use of race or sex as an allocative" criterion. But amici do not explain why broadcasting is a "damaged institution," unless it

has either been distorted by prior discrimination, or is structured in such a way that it fails to supply diverse programming. From all that appears, therefore, the "structural" justification is another name for either the remedial or the programming diversity theory. And to the extent that this justification also carries the suggestion that there is some permanent imbalance built into the broadcasting industry stemming from the original allocation of licenses it, like the Commission's notion of a "unique resources," completely disregards the rapid turnover in broadcasting authority that should permit any such imbalance to be rectified.

The quest for an alternative rationale only reinforces the conclusion that the FCC's minority preference programs are policies in search of a supporting justification. This Court has consistently rejected the idea that the government may pursue a policy of racial balancing for its own sake. See p. 19, *supra*. Yet the creative energies expended in a post hoc effort to uncover a sustainable rationale for the FCC's preference programs suggests that this may in fact be all that they represent.

### CONCLUSION

The judgment of the court of appeals should be affirmed.  
Respectfully submitted.

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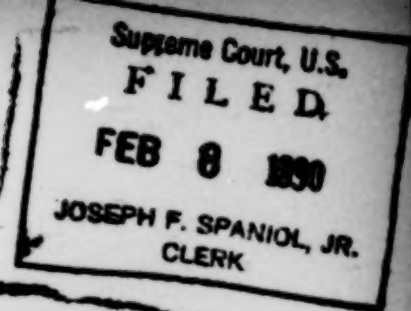
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MARCH 1990

\* The Solicitor General is disqualified in this case.

(9)  
No. 89-700



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Respondent.*

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ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF OF THE NATIONAL BAR ASSOCIATION  
AMICUS CURIAE IN SUPPORT OF PETITIONER

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**QUESTION PRESENTED**

Whether the FCC's distress sale policy implemented under its enforcement authority and ratified by Congress in furtherance of a goal to increase minority ownership pursuant to a public interest mandate and diversity interest is constitutionally permissible when such enforcement authority and minority ownership policy benefits provide a dual benefit to both non-minorities and minorities.

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IN THE  
**Supreme Court of the United States**  
 OCTOBER TERM, 1989

—  
**No. 89-700**  
 —

ASTROLINE COMMUNICATIONS COMPANY  
 LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

*Respondent.*

—  
 ON WRIT OF CERTIORARI TO  
 THE UNITED STATES COURT OF APPEALS FOR  
 THE DISTRICT OF COLUMBIA CIRCUIT  
 —

BRIEF OF THE NATIONAL BAR ASSOCIATION  
 AMICUS CURIAE IN SUPPORT OF PETITIONER  
 —

CONSENT OF THE PARTIES

Petitioner and Respondent have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The National Bar Association was founded in 1925, and is an organization comprised of Black lawyers across the United States. Since its founding, the National Bar Association has been involved in promoting

civil rights activities in an effort to improve the educational, societal, and economic welfare of Black and other disadvantaged Americans. The National Bar Association has, for the last forty years, actively participated in the formation of the nation's telecommunications policy, particularly as it relates to promoting minority employment in and ownership of broadcast facilities.

#### STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as presented by Petitioner.

#### SUMMARY OF THE ARGUMENT

This case involves a claim by Respondent challenging the authority of the Federal Communications Commission ("FCC") to impose sanctions on licensees who violate agency regulations, and its power to devise remedies that conform to its public interest mandate. The Respondent alleges that he has been discriminated against as a result of the FCC's enforcement action. Amicus believes that Respondent's claim, upheld by the District of Columbia Circuit, is inconsistent with, and in fact contrary to, the Court's pronouncements regarding the enforcement authority of legislative agencies. Respondent attempts to turn the FCC's enforcement policy "upside-down" by asserting a race-based claim which is unfounded and indeed diversionary to the Court's enforcement policy cases. Amicus submits that the text of the distress sale policy expresses a nexus with the FCC's enforcement authority in such an inextricable manner as to make the distress sale policy an extension of its en-

forcement authority, not subject to sweeping judicial review.

#### ARGUMENT

##### I. THE DISTRESS SALE POLICY IS AN EXTENSION OF THE FCC'S ENFORCEMENT AUTHORITY

When a licensee is found to have violated FCC rules, it can be subject to a revocation hearing to determine whether it may continue to serve as a licensee.<sup>1</sup> For those licensees who prefer not to engage in the revocation proceeding, the FCC adopted the "distress sale" policy which has since has been interpreted by FCC decisions. *See, e.g., Northland Television, Inc.*, 72 FCC 2d 51 (1979); *Street Broadcasting Corp.*, 47 RR 2d 350 (1980). The distress sale policy, adopted in 1978, allows licensees, subject to revocation hearing, to seek and request assignment of their license to a minority-owned or minority-controlled buyer,<sup>2</sup> so long as the sale price of station facilities

<sup>1</sup> *See Image Radio, Inc.*, 29 FCC 2d 822 (1971) (license renewal denied where station engaged in fraudulent billing and made false statements to Commission in connection with inquiries concerning the same); *L.G. Graves*, 11 FCC 2d 763 (Rev. Bd. 1968) (revocation of citizen's radio station license where licensee repeatedly and knowingly violated various FCC rules); *Weiner Broadcasting Co.*, 57 RR 2d 1679 (1985) (licensee subject to revocation proceeding where licensee committed numerous technical violations, identified the broadcast station with the call-letters of another station not licensed to the licensee, and had refused a Commission inspector access to the station).

<sup>2</sup> The FCC considers a minority-owned or controlled entity as one in which minority interest exceeds 50%, or is controlling. For limited partnerships, the general partner must be a member of a minority group and possess at least 20% of the ownership equity to qualify. *See Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 853 (1982).

amount to no more than 75% of the fair market value of the station. See *Grayson Enterprises, Inc.*, 77 FCC 2d 156, 164 (1980). Specifically, the FCC's distress sale policy reads:

[The FCC] will permit licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, but before the hearing is initiated, to transfer or assign their licenses at a 'distress sale' price [footnote omitted] to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other qualifications.

*Statement of Policy on Minority of Broadcasting Facilities*, 68 FCC 2d 979, 983 (1978) (1978 Policy Statement). The FCC's enforcement authority and its distress sale policy are linked. As demonstrated in the FCC's Clarification of the 1978 Policy Statement, the distress sale policy is inextricably tied to its enforcement discretion. See *Clarification of Distress Sale Policy*, FCC 78-724, 44 RR 2d 479 (1978) (Clarification).<sup>3</sup>

Prior to the creation of the distress sale policy, the assignment of a license when there were unresolved character issues pending against the licensee always raised difficult enforcement questions at the FCC.<sup>4</sup> The FCC's general policy provides, in pertinent part:

<sup>3</sup> In the *Clarification*, *supra*, at 481, the FCC notes that the intent of the policy is to "further encourage minority ownership without adversely affecting the [agency's] interest in preserving its sanctions against misconduct."

<sup>4</sup> See, e.g., *Grayson Enterprises, Inc.*, 77 FCC 2d at 153.

Action on applications to . . . acquire, either by assignment or transfer of control, existing facilities *will generally be deferred* where:

\* \* \*

B. With respect to a prospective seller or an individual who has a controlling interest in the prospective seller there is:

- (1) A pending renewal, revocation or investigative proceeding involving the particular station which is sought to be sold.

*Statement on Qualifications of Broadcast Licensees*, 28 RR 2d 705 (1973)(*Statement*) (emphasis added). Notwithstanding the FCC's *Statement* announcing its policy against granting such transactions on a regular basis, Section 310(d) of the Communications Act calls for grant of the assignment request only "upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. Sec. 310(d). Accordingly, the *Statement* provides that the FCC is authorized to allow the grant of the assignment request pending the revocation proceeding only "[w]here we find that the public interest would be served by granting the application, such a grant would be made subject to the outcome of the pending proceeding. If such a [public interest] finding cannot be made, then the action on the application will be [deferred]." *Statement, supra*, 28 RR 2d at 706.<sup>5</sup> For example, an assignment and sale has been

<sup>5</sup> In applying this policy, the FCC has provided that its language in the *Statement* "does not preclude approval of a sale by a broadcaster facing a hearing on character issues, however, it clearly indicates that the agency will defer consideration of

approved in circumstances when the licensee is either bankrupt or physically or mentally disabled. When the renewal applicant has suffered from physical disability, which had either contributed to his alleged wrongdoing or caused the proposed hearing to be unusually burdensome for him, the FCC has exercised its equitable powers to allow the assignment or transfer of control of a license notwithstanding the existence of unresolved character issues against the licensee. See *Martin R. Karig*, 3 RR 2d 669 (1964) (permittee allowed to transfer control of construction permit because of physical disability even after Initial Decision to revoke permit on grounds of character qualifications). Likewise, the FCC has permitted such assignment in bankruptcy cases. Again, notwithstanding the pending issues concerning a licensee's character, the FCC has allowed the assignment when there was a showing that alleged wrongdoers would not benefit from the sale, or would derive only a minor benefit which is outweighed by the equities in favor of innocent creditors. See *Second Thursday Corporation*, 22 FCC 2d 515, 518-19 (1970), *recon. granted on other grounds*, 25 FCC 2d 112 (1970). In so doing, the FCC made a discretionary policy decision that a licensee's insolvency and the protection of innocent creditors required a careful *ad hoc* balancing of competing interests in determining whether or not the FCC should

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the transaction if the agency cannot find it to be in the public interest." *Grayson Enterprises, Inc.*, 77 FCC 2d at 154. *Grayson* holds that the FCC has discretion, on a case-by-case basis, to permit a licensee in a revocation hearing to assign or transfer control of the license if the agency should find that the licensee's conduct falls within a zone which, in its discretion, it can justify the assignment or transfer of control as consistent with its public interest mandate.

authorize the assignment of a license in the face of the unresolved character issues. See *Erwin A. LaRose and Jimmy Lee Swaggert v. FCC*, 494 F.2d 1145, 1147-48 (D.C. Cir. 1974) (in evaluating a petition for assignment in bankruptcy context, FCC must assess both assignee's qualifications and public interest considerations). Moreover, the FCC has acknowledged that it has made such policy determinations based on its understanding of being "vested with a broad discretion in [its] choices of remedies and sanctions." *WMOZ Inc.*, 3 FCC 2d 637, 639 (1966) (citing *Lorraine Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965)).

The prior explanation of cases and policy has been set forth to enable the Court to understand that the distress sale policy, is rooted in, essentially an extension of, and inextricably tied to, the FCC's enforcement authority to allow licensees to assign their license and sell station assets rather than risk losing the license in a revocation hearing in certain exceptional circumstances.<sup>6</sup>

## II. THE SUPREME COURT HAS HISTORICALLY RECOGNIZED AND GIVEN CREDENCE TO AGENCY DISCRETION IN ITS ENFORCEMENT AUTHORITY

Generally, an agency's decision whether to enforce its own policies through its administrative enforce-

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<sup>6</sup> The FCC has also used the term "Petition for Special Relief" in granting the assignment of a license and sale of station assets notwithstanding the existence of unresolved character issues against the licensee during a revocation proceeding. While the request by the licensee for special relief may be titled differently in the distress sale context, the procedure and analysis utilized for granting the assignment request to the licensee facing a revocation hearing in either case is the same.

ment processes is limited to the agency's discretion. The FCC itself is guided by Section 4(j) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 154(j)), which grants the agency authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." The FCC's broad power to promulgate and enforce its own rules and policies has been acknowledged by the Court in *NBC v. CBS*, 319 U.S. 190 (1943), which presented a challenge to the FCC's enforcement regulations applicable to radio stations engaged in chain broadcasting. In holding that the FCC has authority to promulgate and enforce policies that deal directly with network practices found inimical to the public interest, Justice Frankfurter provided insight into the agency's broad authority to enforce its policies:

We are asked to regard the Commission as a kind of traffic officer, policing the wavelengths to prevent stations from interfering with each other. But the [Communications] Act [of 1934] does not restrict the Commission to merely the supervision of the traffic. It put upon the Commission the burden of determining the composition of that traffic . . . [T]he Act gave the Commission not niggardly but expansive powers. It was given a mandate to encourage the larger and more effective use of radio in the public interest.

*Id.* at 215-16.

Likewise, in *FCC v. Schreiber*, 381 U.S. 279 (1965), Chief Justice Burger's majority opinion specifically cited the FCC's broad discretion to prescribe rules for specific investigations and to make *ad hoc* procedural rulings in specific instances. There he stated,

[A]dministrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.

*Id.* at 290.

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Court dealt specifically with the issue of an agency's refusal to exercise its enforcement authority. Justice Rehnquist's majority opinion noted the "general unsuitability for judicial review of agency decisions to enforcement." *Id.* at 831.

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether the agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed whether the agency has enough resources to undertake the action at all. . . . *The agency is far better equipped than the court to deal with the many variables involved in the proper ordering of its priorities.* Similar concerns animate the principles of administrative law that courts generally defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

*Id.* at 831-32 (emphasis added). Although the facts *sub judice* deal with an agency acting in accordance with its broad discretionary enforcement power, the analysis used in *Heckler, supra*, is instructive. Justice Rehnquist's majority opinion reaffirms that agencies, such as the FCC, are better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities in determining which entities shall be granted licenses. See *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*, 435 U.S. 519 (1978) (formulation of procedures is basically left within the discretion of agencies to which Congress has confided the responsibility for substantive judgments); see also, *FCC v. Schreiber*, 381 U.S. at 290 (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)) (administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties). Cf. *United States v. Batchelder*, 442 U.S. 114, 124 (1979).

The Communications Act itself mandates that the FCC promulgate rules and regulations to ensure "the efficient use of the broadcast spectrum." Absent specific statutory guidelines to determine the definition of the "efficient use of the broadcast spectrum," the FCC is essentially left to its own devices as to how to pursue its public interest mandate. *United States v. Storer Broadcasting Co.*, 351 U.S. 182, 203 (1956). Reference is made to the above cases to demonstrate the Court's deference to agency discretion, particularly in the exercise of its enforcement authority. Amicus believes and here asserts that the court below mischaracterized the distress sale policy solely as a

minority ownership policy unrelated to the FCC's enforcement authority, and by doing so, overreached its authority. See *Shurberg Broadcasting of Hartford v. FCC*, 876 F.2d 902, 910-14, 926 (D.C. Cir.), *reh'g denied*, 876 F.2d 958 (1989). Stated differently, the Court cannot consistently with reason, apply its deference rules differently simply because an agency's enforcement authority is linked to a minority ownership policy, such as distress sales.

### III. THE SUPREME COURT SHOULD DEFER TO THE FCC'S DETERMINATION WHEN THE AGENCY HAS CONSTRUED ITS PUBLIC INTEREST MANDATE AND HOW TO MEET THAT MANDATE AND WHEN CONGRESS HAS RATIFIED THE AGENCY'S DETERMINATION.

Respondent argues, in essence, that the Communications Act does not give the FCC the unbridled authority to use its enforcement powers to fulfill its public interest mandate. Specifically, Respondent objects to the use of the distress sale policy to achieve diversity of programming.

The legislative history of the Communications Act provides no single view about whether Congress intended the FCC to meet its public interest mandate in one particular way. The starting point for analyzing the FCC's actions in using the distress sale policy pursuant to its enforcement powers to achieve diversity of viewpoint is the analysis articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 167 U.S. 837 (1984). There, the Court stated:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as

the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

*Id.* at 842-44.

There is ample legislative history to support the FCC's determination that minority ownership is a means to achieve diversity in programming and viewpoint. See, e.g., *Parity for Minorities in the Media—Hearing on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. (1983); Minority Participation in the Media—Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. (1983); Minority-Owned Broadcast Stations—Hearing on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess. (1986).*

A clearer indication of Congress' approval of the FCC's practice of using its minority ownership policy to meet its public interest mandate occurred in 1982.

Congress created a lottery, but mandated that minority enhancements for minority applicants be incorporated into any random selection licensing scheme. See Communications Amendments Act of 1982, Pub.L.No. 97-259, 96 Stat. 1087, 1094-95, codified at 47 U.S.C. Secs. 309(i)(3)(A) and (C)(ii). The legislative history of the lottery statute removed any remaining doubt as to Congressional approval of the FCC's use of its enforcement authority to achieve diversity of programming through minority ownership, and in particular, through the use of the distress sale policy. The House Report stated that "[t]he underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of program content." See H. Rep. No. 97-765 at 40. Congress explained that the reason for supporting structural means to increase diversity of the media was in the hope that this would "in turn broaden the nature and type of information and programming disseminated to the public." *Id.* at 43.

In revisiting the Communications Act, Congress did not change the minority ownership policy (including the distress sale provision) adopted by the FCC to achieve diversity of the media through increased minority ownership of the media. In the course of adopting the 1982 amendments, Congress considered in detail the minority ownership policy adopted by the FCC. Under these circumstances, it is a strong presumption that by reenacting without including any modification, Congress ratified the minority ownership policy adopted by the FCC. See *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-66 (1951); see also, *Helvering v. R. J. Reynolds Co.*, 306 U.S. 110, 114-15

(1939); *Brewster v. Gage*, 280 U.S. 327, 337 (1930); *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 313-15 (1933). The failure to change the policies under which the FCC operated is significant, for a "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457 (1978)).

In addition to the importance of legislative history, and in support of Amicus' position, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. *NLRB v. Bell Aerospace Co.*, 415 U.S. at 274-75; see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965); *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965); *Norwegian Nitrogen Co. v. United States*, 288 U.S. at 315. This is particularly so where Congress has reenacted the statute without pertinent change. *Zemel v. Rusk*, 381 U.S. at 11-12; *Costanzo v. Tillin-ghast*, 287 U.S. 341, 345 (1932); *Commissioner v. Noel Estate*, 380 U.S. 678, 682 (1965); *NLRB v. Gullett Gin Co.*, 340 U.S. 365-66; *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. at 114-15; *Norwegian Nitrogen Co. v. United States*, 288 U.S. at 313. In the case at bar, the FCC has for nearly a decade construed the Communications Act to connote that diversity of programming could be achieved through minority ownership. Congress did not seek to alter the agency's interpretation of the statute when it amended the

statute to create the lottery scheme. "[T]he fact that [the Court] might not have made the same determination on the same facts does not warrant a substitution of judicial or administrative discretion since Congress had confided the problem to the latter." *CBS, Inc. v. FCC*, 453 U.S. 367, 394-95 (1981) (citing *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946)). "[C]ourts should not overrule an administrative decision merely because they disagree with its wisdom." *CBS, Inc. v. FCC*, 453 U.S. at 384 (citing *Radio Corp. of America v. United States*, 341 U.S. 412, 420 (1951)). The FCC must be allowed to "remain in a posture of flexibility to chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." *CBS, Inc. v. FCC*, 453 U.S. at 390. Amicus posits that the FCC's interpretation of the statute to mean that diversity can be achieved through minority ownership is a constitutionally acceptable accommodation between, on the one hand, use of the agency's enforcement power, and, on the other hand, diversity of the effective and efficient programming through increased minority ownership in furtherance of the First Amendment. See *Associated Press v. United States*, 326 U.S. 1, 20 (1944).

The Supreme Court in previous decisions has recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight, also. *NLRB v. Bell Aerospace Co.*, 416 U.S. at 275 (citing *Red Lion Broadcasting v. FCC*, 395 U.S. at 380-81; *FHA v. Darlington, Inc.*, 358 U.S. 84, 90 (1958)). Implicit in the legislative history of the amended Communications Act creating the lottery statute, is Congressional intent demonstrating the

FCC's original statutory mandate to achieve diversity of programming.

Failure of Congress to modify the FCC distress sale policy, coupled with it having conducted its own studies and hearings on minority ownership, demonstrates that Congress was clearly aware of the challenge to the policy in the public arena and in the federal court. These facts, alone, make out an unusually strong case of legislative acquiescence in and ratification by implication of the distress sale policy.

In the case *sub judice*, the Court is not presented with an ordinary claim of legislative acquiescence. The nonaction in the case *sub judice* is important. Since 1983, the FCC's minority ownership policy, including the provision for distress sales, has been the focus of debate of Congressional hearings and the subject of litigation in the D.C. Circuit. See above-referenced hearings; and *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated and reh'g. en banc granted*, Order of Oct. 31, 1985, *remanded*, Order of Oct. 9, 1986. It is inconceivable that Congress was not acutely aware of what was going on. In view of its prolonged and acute awareness of so important an issue, Congress' choice not to act to modify the distress sale policy provides added support for concluding that Congress was satisfied with the FCC's use of its enforcement power through the distress sale policy to achieve diversity through minority ownership. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379-82 (1982); *Haig v. Agee*, 435 U.S. 280, 300-01 (1981); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983); *United States v. Rutherford*,

442 U.S. 554, n.10 (1979). It is a well-settled maxim in statutory construction that, while "it may not always be realistic to infer approval of an . . . administrative interpretation from Congressional silence alone . . . once an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-89 (1940) (citations omitted). See *United States v. Bergh*, 352 U.S. 40, 46-47 (1956). The issue presented in the instant case plainly has not escaped public or legislative notice. Therefore, in the face of Congress' extensive knowledge of the FCC's distress sale policy, illustrated by the above-referenced Congressional hearings and the legislative history accompanying the lottery statute,<sup>7</sup> the Court should be amply persuaded that Congress adopted and ratified the distress sale policy.

This is plainly a case in which "the intent of Congress is clear [and] the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842-43. Any remaining doubt as to Congress' approval of the

<sup>7</sup> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414, n.8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920); 2A C. Sands, *Sutherland on Statutory Construction*, Sec. 49.09 and cases cited (4th ed. 1973).

minority ownership policy, and in particular, the distress sale policy, was removed on December 22, 1987, when the President signed into law House Joint Resolution 395.<sup>8</sup> The Continuing Resolution read, in pertinent part:

That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended, 32 R.R. 2d [1301] (1982) and Mid-Florida Television Corp., [69] F.C.C.2d 607 Rev. Bd. (1978) which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.<sup>9</sup>

The Senate Report accompanying the Continuing Resolution provides further legislative history to support the FCC's minority ownership policy as an ac-

<sup>8</sup> Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes, Pub.L. 100-202, 101 Stat. 1329 (1987) (162a).

<sup>9</sup> The Commission ordered MM Docket No. 86-484 terminated, pursuant to the legislative mandate. 3 FCC 2d 776 (1988).

ceptable means to meet the administrative agency's public interest mandate. It reads:

The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences. In approving a lottery system for the selection of certain broadcast licensees, the Congress explicitly approved the use of preferences to promote minority and women ownership. See 47 U.S.C. section 309(i)(3)(A) and H.R. Conf. Rep. No. 765, 87th Cong., 2d Sess. 37-44 (1982).

S. Rep. No. 110-182, 100th Cong., 1st Sess. 76 (1987).<sup>10</sup>

In 1987, The Congressional Research Service analyzed data collected by the FCC to examine the merit of the assumption that a link existed between minority ownership and programming. The inquiry was subsequently terminated in compliance with a Congressional mandate expressed in the Continuing Resolution, *infra*. Based on the data collected, however, the CRS concluded that "there is a strong indication that minority and women station ownership results in a greater degree of minority programming." See "Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?"

<sup>10</sup> Congress has since twice reenacted a similar ban on disturbing the distress sale policy and the FCC's other minority preference policies, through fiscal 1989 and fiscal 1990. Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988) (163a); Pub. L. No. 101-162, 103 Stat. 1020-1021.

Congressional Research Service, Economics Division, June 29, 1988.

The minority ownership policy was prepared by the agency charged with the duty of enforcing the Communications Act. There is ample evidence that the policy so established is a reasonable balance between achieving diversity of the media through increased minority ownership and harms neither the letter nor spirit of the provisions construed and therefore should not be disturbed. In other words, the FCC's distress sale policy, coupled with its enforcement authority, is a rational means to achieve diversity to appropriately increase commercial speech in the marketplace.

"To the external aids that are drawn from history and analogy and administrative practice, there is to be added another [aid] that may be said to be internal, the aid to be derived from the wording of related sections," in ascertaining Congressional intent. See *Norwegian Nitrogen Co. v. United States*, 288 U.S. at 315. In the same Communications Act that speaks of the FCC's public interest mandate is the amended section creating a lottery, but directing that minority enhancements for minority applicants be incorporated into any random selection licensing scheme. See Communications Amendments Act of 1982, Pub.L.No. 97-259, 96 Stat. 1087, 1094-95, codified at 47 U.S.C. sections 309(i)(3)(A) and (C)(ii). In enacting the lottery statute, Congress implicitly removed some of the vagueness behind the meaning of the public interest mandate under which the FCC operates. Stated differently, the lottery statute implicitly suggests that Congress sanctioned the FCC practice of using its enforcement authority to achieve diversity of programming through increased minority ownership. Cf.

*Norwegian Nitrogen Co. v. United States*, 288 U.S. at 316 (There are times when the obscurity of one section as contrasted with the clearness of another may be ascribed to inattention).

In summary, Congressional approval of the minority ownership policy, and in particular the distress sale provision, is clear and evidenced by: (1) a series of Congressional hearings held on minority ownership in telecommunications; (2) the legislative history accompanying the lottery statute; (3) a Continuing Resolution mandating the continuance of the minority ownership policy, which was signed by the President; (4) a CRS study validating the underlying rationale of the agency's determination that a nexus exists between diversity of programming and minority ownership; and (5) legislative acquiescence in and ratification by implication of the distress sale policy, of which Congress has been acutely aware. Therefore, the Court should defer to how the agency has construed its public interest mandate and the means chosen to meet its statutory obligation, to wit, the agency's enforcement power is used to achieve diversity of programming through minority ownership and in furtherance of the First Amendment. *Associated Press*, 326 U.S. at 20.

**IV. THE APPLICATION OF THE DISTRESS SALE POLICY IS REASONABLE AND CONSTITUTIONALLY PERMISSIBLE BECAUSE IT BENEFITS NON-MINORITIES AND DOES NOT TRAMMEL ON THEIR INTEREST, OR UNDULY ON RESPONDENT**

Respondent prevailed in the court below basically because the court determined that the FCC's distress sale policy causes non-minorities to "shoulder an excessive burden" by depriving them of the opportunity

to own a broadcast station. *Shurberg Broadcasting, of Hartford, Inc. v. FCC*, 876 F.2d at 917.

Amicus submits that the conclusion reached by the court below mischaracterizes the distress sale policy solely as a pro-minority policy and places its blinders on with regard to the pro-majority benefit to a class of people to which Respondent belongs. Respondent's claim of discrimination is inconclusive because the distress sale policy, which becomes operative only in an enforcement proceeding, has, in the main, financially benefitted, non-minority licensees, and therefore, must be considered equally a pro-majority policy.<sup>11</sup>

<sup>11</sup> That the benefit of the distress sale policy directly favors non-minorities can be deduced from the dearth of minority broadcasters in the broadcast services. Today, there are approximately 11,000 broadcast radio and television licensees, barely 2 percent that are minority-owned or controlled. Since 1978, the year that the distress sale policy was adopted, thirty-eight (38) distress sales arising out of enforcement proceedings have been granted. Amicus is unaware of any *assignor minority licensee* who has benefitted from any of the 38 distress sales under the FCC's enforcement policy. Clearly, the FCC's distress sale policy, when adopted and as implemented, has benefitted equally majority licensees on the enforcement side to which the distress sale policy is tied.

The FCC does not officially maintain a list of minority owned stations, however, the percentage of minority owned stations has not changed significantly since 1986. In 1986 there were "1,181 television stations in America. . . and. . . 9,512" AM and FM radio stations. In both categories combined, minorities owned barely two percent of the total, and so it is today. See J. C. Smith, Jr., "Telecommunications And Black Americans: The Unmeasured And Untold Marketplace Factor," Paper Before the Fifteenth Annual Communications Conference, School of Communications, Howard University, at 6-7, Feb. 13, 1986. From its inception, the distress sale policy was instrumental in in-

During a recent hearing on minority ownership of broadcast stations by the Subcommittee on Communications, of the Senate Committee on Commerce, Science and Transportation, the dual purpose of the distress sale policy coupled with the FCC's enforcement authority was explained as follows:

The distress sale policy grew out of a dual, not a singular, but a dual recognition by the FCC that it could affect greater diversity in the marketplace through a distress sale policy tied to its enforcement authority. This mixed objective was thought to be well within the public interest mandate prescribed by the Congress in 1934, the year that Congress enacted the Communications Act.

Hence, from its inception, one of the dual objectives of the distress sale policy was to provide direct relief to non-minorities.

creasing the number of minority owners, albeit modestly. J. C. Smith, Jr., "The Dearth of Minority Voices In The Information Mix," Paper Before National Black Media Coalition, Eighth Annual Media Conference 10, Oct. 8, 1981. See generally, Wilson, "Minority and Gender Diversity in the Broadcast Marketplace," 40 *Fed. Comm. L. J.* 89 (1988). A month before the 1981 NBMC Conference FCC Chairman Mark Fowler had declared, "we at the FCC. . . will not. . . turn back the gains made by minorities in this country. . . will not frustrate the gains made by minorities in telecommunications. . . ." *FCC Release*, No. 003550, at 3 (Sept. 24, 1981).

Whether the FCC has turned back the gains made by minorities in the past decade is subject to debate. However, it is not arguable that minority ownership did not increase significantly. The 11,000 broadcast licenses currently reported by the FCC remain unmistakably non-minority. See *FCC New Release*, No. 0025 (Oct. 4, 1989).

Now, how did this policy directly aid non-minorities? The policy allowed the non-minority to exit his or her existing broadcast business without costly hearing and permitted the non-minority licensee to salvage 75 percent or less of the fair market value in the sale of their broadcast property.

This was a significant economically beneficial policy for non-minorities because it permitted them to avoid administrative costs by bypassing a revocation hearing and by being able to reap a profit of up to 75 percent or less of fair market value.

In fact, non-minorities affirmatively sought and gained a clarification from the FCC to make the application of the distress sale policy retroactive. A copy of the clarification of distress sale policy, FCC number 78-725, attached to this oral statement is submitted to the record as evidence on nondiscrimination.

I guess, in sum, to sum up quickly, the key of my remarks here is to demonstrate that the claims made in the Shurberg case that are being argued that the distress sale policy discriminated against the non-minorities has substantially been mischaracterized.

The distress sale policy created a dual policy that favors non-minorities and minorities, and is constitutionally permissible.

*Minority Ownership of Broadcast Stations: Before Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st*

Cong., 1st Sess. 139-40. (Testimony of Prof. J. Clay Smith, Jr.)

Hence, licensees, like Respondent, if cited for a rule violation triggering FCC revocation enforcement proceedings, could opt to evoke the distress sale policy to their economic advantage. See, e.g., *Northland Television, Inc.*, 72 FCC 2d 51 (1979); Comment, *FCC Minority Distress Sales Policy Public Interest v. The Public's Interest*, 1981 Wisc. L. Rev. 365, 367, n.16. While the court below did not comment at length on the financial benefit to majority licensees and the nexus between the FCC's enforcement policy and the distress sale policy, it did note that the distress sale policy was financially attractive to station owners designated for hearing. *Shurberg Broadcasting of Hartford, Inc.*, 876 F.2d at 904 n.2.

Claims such as the one raised by Respondent have been raised in other contexts, such as when an affirmative action program has benefitted Blacks and Whites as well. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 199 (1978). Complainant in *Steelworkers* claimed discrimination under Title VII of the Civil Rights Act of 1964 because seven Blacks and six Whites were selected for a training program under a collective bargaining agreement. Claimant, the seventh White was excluded because the plan called for only 13 trainees. In the instant case, Respondent, though in a class that could take advantage of the enforcement policy aspect of the distress sale policy, claims that he has been denied equal protection of the law by the same enforcement policy in which he could find sanctuary, if necessary.

A careful review of the FCC's distress sale/enforcement policy demonstrates that it "does not unneces-

sarily trammel the interest of white[s]. . . .," *id.* at 208, or those of Respondent. The policy does not create a *numerus clausus* - the quota. The number of instances that the distress sale policy has been exercised is *de minimus*. The implementation of the distress sale policy is not automatic because there is no guarantee that a minority can meet the qualifications to become a licensee. This is not a case where a less qualified minority is preferred over a more qualified White. *Id.* at 225 (Rehnquist, J., dissenting). Indeed, it is not even a case where Whites are excluded from co-ownership with minorities, since Whites may have a sizeable interest in the broadcast property, so long as it is less than "a significant minority ownership interest." *1978 Policy Statement*, 68 FCC 2d at 983. This demonstrates that the FCC's distress sale policy is not racially exclusionary. The functional implementation of the distress sale policy points to almost unrestricted joint participation of minorities and non-minorities. Since Whites may have an interest in the broadcast station along with minorities, such co-ownership of interest cannot be termed as "impermissibility of stereotyping." *Shurberg Broadcasting of Hartford, Inc.*, 902 F.2d at 922 (citing *City of Richmond v. Croson*, 109 S. Ct. 706, 733-34 (1989)).

Amicus' argument that the distress sale policy, triggered by the FCC's enforcement process, is driven, in part, by Justice O'Connor's reliance on Professor John Ely's article, "The Constitutionality of Reverse Racial Discrimination," 41 *U. Chi. L. Rev.* 723, 739 (1974), cited with approval in the majority opinion in *City of Richmond v. Croson*, 109 S. Ct. at 722. There, the Court looked to the composition of Richmond's

Black population and its political majority on the Richmond City Council and concluded that in instances where Blacks constitute "a political majority" in decisions adversely affecting Whites "the application of heightened judicial scrutiny" will be used by the Court in its exercise of judicial review. Citing footnote 58 of Professor Ely's article, the Court appears to adopt Ely's language: "Of course it works both ways: a law that favors Blacks over Whites would be suspect if it was enacted by a predominately Black legislature." *Id.* at 739, n.58.

In the case before the Court, the tables are turned and point all too clearly toward an agency enforcement/distress sale policy that has a dual purpose of benefiting Whites and minorities. Thus, Amicus calls the Court's attention to Professor Ely's position that "[w]hen the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself," this does not present a case of invidious discrimination. *Id.* at 735. Because of the importance that the Court attributed to Professor Ely's article in *Croson*, Amicus sets forth in its entirety the language from his article which summons the Court to reverse the case at bar:

When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being usually suspicious, and, consequently, employing a stringent brand of review, are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alter-

native classification that would extend to certain Whites the advantages generally extended to Blacks.

*Id.*

All of the procedural and substantive acts of the FCC, its enforcement authority and its distress sale policy, amply demonstrate that the members of the FCC, "the control group," did not disadvantage Whites, or Respondent, for reasons of racial prejudice when it adopted the distress sale policy. The FCC devised a policy which advantaged Whites and minorities in such a neutral way that "employing a stringent brand of review, [is] lacking." *Id.* The short of it is that Respondent has not been discriminated against in an invidious manner, nor have White people as a class. They continue *in all respects* to be advantaged by the FCC's enforcement and distress sale policies, and some would advantage them even more. See *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, Nos. 87-1285, et al., Slip op. at 1-12 (D.C. Cir., Jan. 12, 1990) (Williams, J., dissenting). The advantage to Whites is economics on the enforcement side; the advantage to Whites is economics on the minority ownership side. As applied, both policies are reasonable, rational and constitutionally permissible.

#### CONCLUSION

For the reasons stated in this Brief, The National Bar Association respectfully concludes that Respondent's claim should fail and that the opinion of the court below be reversed *sine mora*.

Respectfully submitted,

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February 9, 1990

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,  
v. *Petitioner,*  
SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF OF THE COMMITTEE TO  
PROMOTE DIVERSITY AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

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February 9, 1990

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ASTROLINE COMMUNICATIONS COMPANY  
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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

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The Committee to Promote Diversity respectfully requests leave to file the accompanying brief amicus curiae in behalf of Petitioner, Astroline Communications Company, Limited Partnership. Both the petitioner and the Acting Solicitor General of the United States have consented. This motion is necessitated by the fact that Petitioner, Shurberg Broadcasting of Hartford, Inc. has not consented.

The Committee to Promote Diversity is a group of organizations—principally licensees and financiers of broadcast stations—that have worked to foster the First Amendment principle of diversity of programming by increasing the numbers of minority-owned broadcast stations through appropriate means, including the distress

sale policy, the constitutionality of which is at issue in this case.

The Committee membership encompasses both minority and nonminority station owners. The Committee is thus uniquely able to present to the Court a racially balanced perspective on the issue in this case, of which it has first-hand knowledge and experience. Committee members have actively participated in the implementation of the Congressionally mandated policies administered by the Federal Communications Commission that serve the compelling public need for diversification of broadcast programming sources and increased participation by minorities in the ownership of broadcast stations. These policies include the distress sale policy, along with the enhancement of credit for integration of minority ownership and management in FCC comparative licensing proceedings, and the issuance of tax certificates conferring tax deferral benefits on FCC licensees who sell their stations to minority buyers.

Members of the Committee have participated in the design and drafting of the FCC Policy Statement on Minority Ownership, and have testified on the subject at Congressional and FCC hearings and industry conferences. Members have also, as entrepreneurs, served the Congressional objective of increasing the number of minority-owned broadcast stations as a means of helping to meet the Congressionally declared compelling public need for diversification of the sources of broadcast programming.

The members of the Committee are:

Broadcast Capital Fund, Washington, D.C.  
(MESBIC)

Cook Inlet Communications, Inc. (holding corporation for 2 TV and 11 radio stations)

Four Star Broadcasting Company (former licensee of KTHH (TV) Houston, Texas)

George N. Gillett, Jr.) (owners of eleven  
Gillett Holdings, Inc.) television stations)

Kyles Broadcasting, Ltd. (TV station permittee for  
Channel 50, Memphis, Tenn.)

Minority Broadcast Investment Corporation  
(MESBIC)

National Institute for Communication and Education  
(media consultants)

Silver Spring Communication (Awarded Initial Decision for new FM station in Silver Springs, Florida)

The experience, understanding, commitment, and concern of the Committee's members, coupled with their inter-racial composition, uniquely qualified the Committee to provide useful assistance to the Court. Accordingly, the Committee to Promote Diversity respectfully moves that the Court grant it leave to file the accompanying Brief Amicus Curiae in support of the Petitioner.

Respectfully submitted,

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February 9, 1990

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IN THE  
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OCTOBER TERM, 1989

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No. 89-700

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On Writ of Certiorari to the  
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**BRIEF OF THE COMMITTEE TO  
 PROMOTE DIVERSITY AS AMICUS CURIAE  
 IN SUPPORT OF PETITIONER**

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**INTEREST OF AMICUS CURIAE**

The Committee to Promote Diversity is an *ad hoc* group of organizations and individuals that, through their involvement in telecommunications, have worked to foster the First Amendment principle of diversity of programming by increasing the representation of minorities and women among the owners of broadcast stations. The Committee is composed of Commission licensees and permittees that have utilized one or more of the race- or gender-conscious policies adopted by the Federal Communications Commission pursuant to Congressional and judicial direction: mainly the distress sale policy, the

tax certificate policy or the comparative hearing "enhancement" policy.

Each of the members of the Committee has long been concerned with the integrity of the procedures under which the Federal Communications Commission awards licenses and approves station transfers. Committee members have testified at hearings on minority ownership held by Congress, the Commission, and private industry. Many of the Committee members participated in the design and drafting of the FCC Policy Statement on Minority Ownership adopted over a decade ago. Since that time, many members have utilized these policies in the public interest and through prudent entrepreneurship have increased the number of minority-owned broadcast stations, thus serving the judicially, legislatively, and administratively recognized goal of greater diversity of programming sources for the entire viewing and listening public, nonminority as well as minority.

By virtue of their experience, understanding, and commitment to the central issues presented here, the following members of the Committee to Promote Diversity are uniquely qualified to address the Court as *amicus curiae*:

Broadcast Capital Fund, Washington, D.C.  
(MESBIC)

Cook Inlet Communications, Inc. (holding corporation  
for 2 TV and 11 radio stations)

Four Star Broadcasting Company (former licensee  
of KTHH (TV), Houston, Texas)

George N. Gillett, Jr. (owner of 11 TV stations)  
Gillett Holdings, Inc.

Kyles Broadcasting, Ltd. (TV station permittee for  
Channel 50, Memphis, Tenn.)

Minority Broadcast Investment Corporation  
(MESBIC)

National Institute for Communication & Education  
(media consultants)

Silver Springs Communication (awarded Initial  
Decision for new FM station in Silver Springs,  
Florida)

### OPINIONS BELOW

A sharply divided panel took four years to decide this case. Three lengthy separate opinions collectively totaling 110 printed pages were issued. Two of three judges remanded the proceeding to the Commission, finding that the distress sale policy is unconstitutional because it "is not narrowly tailored to remedy past discrimination or to promote programming diversity." *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989) (*per curiam* opinion at 2). Although the judges in the majority accompanied the short *per curiam* opinion of the Court with 67 pages of separate opinions, they agreed only in finding that the distress sale policy is unconstitutional because it "unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interest it seeks to vindicate." *Ibid*.

Chief Judge Wald dissented from the judgment and opinions of the two other members of the panel, stating that "[i]n casting off a thoughtfully conceived and monitored program aimed at attaining a legitimate congressionally mandated end, the majority has too rigidly applied Supreme Court affirmative action guidelines designed for other types of programs, ignored firm precedents in this circuit, and failed to credit the explicit intent of Congress." 876 F.2d at 934.

Both the FCC and Astroline sought rehearing *en banc* arguing that the two judges failed to defer to Congress' judgment that promoting broadcast diversity justified the use of the distress sale policy for minority buyers in "the small numbers of situations each year where the FCC orders a hearing on a broadcast licensee's basic qualifications." FCC Petition for Rehearing and Suggestion for Rehearing *En Banc* at 2, 3. Further, the FCC said that the analysis used by the two judges below was

so flawed that, if it were adopted as precedent in other courts, it could "invalidate almost any race-conscious programs that a federal agency or Congress could devise." *Id.* at 14.

On June 16, 1989, the Petitions for rehearing *en banc* were denied by a 5-5 vote among the judges in regular active service on the court, thus preserving the panel opinion. Chief Judge Wald dissented from the denial of rehearing *en banc*, joined by Judges Robinson, Mikva, Edwards, and Ruth B. Ginsburg. They joined in Chief Judge Wald's dissent, in which she wrote that "the continued use of the distress sale policy has been mandated by an Act of Congress." 876 F.2d at 958.

Astroline took an appeal to the United States Supreme Court by writ of certiorari, which was granted. — U.S. — (released January 8, 1990).

#### STATUTORY AND REGULATORY PROVISIONS

The Constitution of the United States and the First and Fifth Amendments thereto, the Communications Act of 1934, 47 U.S.C. 307(c), the Communications Amendments Act of 1982, 47 U.S.C. secs. 309(i)(3)(A) and (C)(ii), the Joint Resolution, Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987), the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186 (1988), and Pub. L. No. 101-62 (1989).

#### STATEMENT OF THE CASE

Astroline obtained the license for television station WHCT-TV in Hartford, Connecticut under the FCC's distress sale program, which permits a licensee designated for hearing on license revocation or on character issues raised on license renewal, to assign its license to a minority-controlled entity for no more than 75 percent of its appraised value. *Statement of Policy on Minority*

*Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978); *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849 (1982). The FCC adopted the distress sale program to promote diversity of viewpoint through diversity of ownership in the nation's airwaves, and to remedy the effects of "historical underrepresentation of minorities in broadcasting." *Id.*

Shurberg Broadcasting of Hartford, Inc. and its principal, Alan Shurberg (collectively "Shurberg"), petitioned the FCC to entertain a competing application for WHCT-TV, and challenged Astroline's status as *bona fide* minority-controlled. In *Faith Center, Inc.*, 99 FCC 2d 1164 (1984), the FCC approved the distress sale to Astroline, and an appeal followed. Astroline assumed ownership and management of WHCT-TV during the three years between oral argument and decision in this case, and currently operates this station on Channel 18. Judges Silberman and MacKinnon wrote separate opinions, disagreeing as to the constitutionality of Congressional determinations that minority ownership would lead to diversity of viewpoint, but both concede the compelling governmental interest in diversity in broadcast programming. Chief Judge Wald dissented, maintaining that the program serves a compelling governmental interest, and that its means are narrowly tailored to achieve that end.

#### SUMMARY OF ARGUMENT

The distress sale policy is constitutional. This race-conscious policy serves the recognized, strongly compelling public need to augment the participation of minorities in determining the content, balance, and scheduling of this nation's broadcast programming, to the benefit of both minority and nonminority listeners and viewers. It meets every requirement of applicable precedent, and it avoids every pitfall that has invalidated other race-conscious programs.

The distress sale policy, adopted originally by the Federal Communications Commission at the request of the Congressional Black Caucus, has since been mandated by express enactment in at least three Federal statutes. It permits the owner of a broadcast station whose license is at issue in a license revocation proceeding of whose character qualifications are at issue in a license renewal hearing, to make a "distress sale" of the station to a minority buyer at a discounted price.

The policy meets every legislated and adjudicated requirement. It serves a need so compelling that this need has stood for decades as the cornerstone principle governing broadcast allocations, licensing, and regulation: providing to the American public information from as many diverse sources as possible. Nothing in the panoply of public interest objectives governing the federal government's action respecting broadcasting touches a deeper chord, or is more universally recognized, than that broadcasting must contribute its indispensable share to the array of diverse, and even antagonistic, sources of information available to the public. On that depends nothing less than much of the ability of the citizens of the United States, as members of a free society, to exercise their freedoms in an informed manner, wisely, and in the best interests of all.

That our multi-faceted society—the "melting pot"—will not only benefit from, but crucially needs, information from diverse and antagonistic sources is rudimentary, and virtually universally recognized. That this need is well served by unfettered participation by minorities in the flux of public debate on matters of concern to minorities and nonminorities alike is rudimentary, and recognized by all enlightened persons of good will. The inevitable corollary is that adequate minority participation in shaping the programming fare offered to all elements of the broadcast audience—virtually synonymous with the entire populace—is compellingly important to the well-being of this society.

The FCC has recognized this. Congress has also. So has the Court of Appeals for the District of Columbia Circuit in cases that antedated this Court's landmark *Bakke*, *Wygant*, and *Croson* decisions on race-conscious programs that sought to serve a compelling public need. The two judges below in the instant case mistakenly construed those decisions by this Court as invalidating the distress sale policy.

The FCC, Congress, and the Court of Appeals for the District of Columbia Circuit in previous decisions, have recognized that a practicable, effective way open to governmental authorities to foster programming diversification regarding minority concerns that touch the interest of both minorities and nonminorities is by augmenting minority ownership of broadcast stations. The distress sale policy contributes modestly, but significantly, to this objective, thus helping to fulfill a compelling public need.

None of the vices that have been held to invalidate other race-conscious programs applies to distress sales of broadcast stations. A finding of compelling public need is not lacking. That finding was made by Congress in the exercise of its broad, express power, that this Court has recognized, to devise and adopt legislation enforcing the provisions of the 5th and 14th Amendments. It thus does not suffer the disability of being a sparsely or incorrectly documented finding by a political subdivision of a state. The Congress acted on the basis of information before it from which it was rational to infer the compelling need that it found to enhance diversification of broadcast programming sources by augmenting minority ownership—in part through the FCC's distress sale policy that the FCC now applies, in conformity with express statutory directives.

The distress sale policy is not a set-aside of a fixed quantity or percentage of benefits, and is thus not subject to disabilities that have been held to invalidate

some—but not all—set-asides of stated percentages of benefits for exclusive participation of minorities. Of many thousands of broadcast stations that have changed hands since the FCC adopted the policy, fewer than 40 have passed to minority buyers under the application of that policy.

There was no failure to seek and try non-racially conscious means of fulfilling the ascertained compelling public need. The distress sale policy is one of the means mandated by the Congress to supplement other, non-racially-conscious methods that had failed to lift the level of minority ownership of broadcast stations above 2% of the total. To the modest extent that the distress sale policy has affected, or could be expected to continue to effect increased minority ownership of broadcast stations, it has not done so by depriving any person of a broadcast license to which he is entitled. The policy is thus not analagous to depriving employed persons of their jobs that this court has held places an excessive burden on affected nonminority persons.

The remedy is not disproportionately broad. It is modest in scale, but directly tailored toward supplementing other means that have been developed to serve the same needs. In short, correctly viewed, the distress sale policy meets every adjudicated requirement of a race-conscious means to fulfill a compelling public need, albeit a different one from those that members of this court have hitherto expressly recognized as potentially compelling (i.e., remedying the effects of past discrimination, and enhancing the diversity of a state university's student body). The express recognition that members of this Court have accorded to diversity at universities as a potentially compelling public need strongly supports the conclusion that, *a fortiori*, the need to enhance deficient diversity in the ownership of the encompassing medium of broadcasting, which directly touches all, is more than sufficiently compelling to justify the race-conscious procedure that the distress sale policy entails.

## ARGUMENT

### I. THE FEDERAL PROGRAM TO PROMOTE MINORITY OWNERSHIP IS CONSTITUTIONAL.

The goal to increase minority ownership has been embraced by all branches of the Federal Government. In *Loyola University v. FCC*, 670 F. 2d 1222, 1225-26 (D.C. Cir. 1982), the court held that the FCC had properly considered the expansion of minority ownership as a public interest factor weighing the favor of modification of its clear channel rules to permit additional stations to use those channels. The court cited with evident approval the FCC's conclusion that "all three branches of government have recognized the importance of fostering minority participation in ownership and operation of broadcast stations." *Id.* at 1226, n.9.

In *West Virginia Broadcasting Co. v. FCC*, 735 F.2d 601, 613 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), this Court held that the FCC's grant of an enhancement credit in comparative hearings to minority applicants "easily passes constitutional muster" in light of the Supreme Court's standards for affirmative actions programs in *Fillilove v. Klutznick*, 448 U.S. 448 (1980) and *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Increasing diversity of broadcasting content, this Court held, is "a vital part of the FCC's public interest mandate" which should be pursued through FCC policies to promote ownership by minorities who were "excluded from and remain[] extremely underrepresented within the nation's broadcast media." 735 F.2d at 611. *West Michigan* followed and reaffirmed two prior decisions of this Court, *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) and *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975), in which the Court pressed upon a then-reluctant FCC the duty to give favorable consideration to minority applicants for broadcast licenses. *See generally*, Wilson, "Minority and Gender Enhancements: A Necessary and

Valid Means to Achieve Diversity in the Broadcast Marketplace," 40 *Fed. Comm. L.J.* 89 (1988).

Subsequent to *West Michigan*, the Court of Appeals again found a firm constitutional basis for the FCC's minority preference programs, expressly including the distress sale policy. Judge Tamm concluded that "under our decisions, the Commission's authority to adopt minority preferences event apart from the lottery process—at least where such preferences are tied to minority participation in the management of broadcast facilities—is clear." *Steele v. FCC*, 770 F.2d 1192, 1196 (D.C. Cir. 1985), *vacated and rehearing en banc granted* (Oct. 31, 1985). (The case was subsequently settled, and thus no final decision was rendered on the merits.)

In fact, the holding of neither *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) nor *City of Richmond v. J. A. Croson*, 109 S. Ct. 706 (1989) lessen *West Michigan's* continuing force. Both *Wygant* and *Croson* dealt with programs created by local authorities, not by Congress, while the distress sale policy, like the FCC's other minority preference policies aimed at fostering diversity of expression through diversity of ownership, has Congress' explicit imprimatur. See Sec. II, *infra*. The *Croson* plurality stressed "that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 109 S. Ct. at 718, *quoting Fullilove*, 448 U.S. at 483 (emphasis by the Court). See *Cleland v. National College of Business*, 435 U.S. 213 (1978); *Mathews v. De Castro*, 429 U.S. 181 (1976) (Congressional deference is accorded to legislation raising equal protection concerns).

Moreover, *Wygant* and *Croson* each dealt with programs intended solely to remedy discrimination. The distress sale policy, by contrast, also rests on the compelling governmental interest in diversity of expression in broadcasting, a First Amendment concern at the heart

of the FCC's public interest responsibilities under the Communications Act of 1934. *FCC v. National Citizens Commission for Broadcasting*, 436 U.S. 775, 795 (1978).

This brief refers both to the need to enhance programming diversification and to remedy underrepresentation of minorities in broadcasting. Both are compelling public needs. Thus either, standing alone, is sufficient to justify the distress sale policy.

## II. CONGRESS HAS EXPRESSLY APPROVED THE DISTRESS SALE PROGRAM AND ORDERED THE FCC TO CONTINUE IT.

The distress sale program is neither the invention of a state or local government nor the creation of a federal agency acting solely on its own authority. As Chief Judge Wald noted, it is "a deliberately chosen congressional policy, embodied in legislation passed by the House and Senate and signed by the President." See *Shurberg* at 943. In *Fullilove*, the Supreme Court stressed the deference courts owe to Congress' authority to make findings and prescribe remedies to advance government interests. 448 U.S. at 472. Conversely, Judge Silberman, while admitting that "Congress may act to remedy past discrimination based upon less particularized historical evidence than would be required of another governmental body or court of law" boldly and erroneously faults Congress for failing to compile an adequate factual record. He concludes that the Congressional record compiled over a twelve-year period amounted to "simply assertions," "meager evidence" and "ipse dixit." *Shurberg* at 909-28. The judicial denigration of the legislative process exhibited by the junior member of the lower court panel amounted to "belittlement of Congress". See, *Shurberg* at 940, n.29. (dissent, Wald, C.J.) Not only are Judge Silberman's observations an inappropriate basis for invalidating the legislative actions of a co-equal branch of government, his conclusion is not factually correct. Indeed, Congress has established a long record on this issue. See Senate Report on Minority Ownership of Broadcast

Stations: Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation. 101 Cong. 1st Sess. (1989). *See also* S.Rep. 182, 100th Cong., 1st Sess. 76 (1987).

In 1982, Congress required the FCC, if it replaced the comparative hearing process with a lottery, to adhere to its existing preferences for minority applicants. In the Conferees report, Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H.R. Rep. No. 765, 97th Cong. 2d Sess. 43 (1982), 128 Cong. Rec. H6527, 22138-42, 22140 (daily ed. August 19, 1982). Sec. 115, Communications Amendments Act of 1982, Pub.L. No. 97-259, 47 U.S.C. § 309(i) (3) (A) and (C) (ii). Congress' action, based on findings of prior discrimination and the need to foster diversity, "must be viewed as congressional approval of the FCC's minority ownership promotion policies." *West Michigan*, 735 F.2d at 616 (footnote omitted). In 1987, after the FCC said it wanted to reexamine the constitutionality of those policies, and requested a remand of this case for that purpose, Congress again intervened and forbade the FCC to retreat from its minority preference policies, expressly including the distress sale policy at issue here. Pub.L.No. 100-202, 101 Stat. 1329 (1987). "Any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's *goals and means*." *West Michigan*, 735 F.2d at 615, *quoted in Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, at 358 (D.C. Cir. 1989) (emphasis added).

Judge Silberman's opinion disregards Congress' approval of the distress sale program because Congress, in his view, failed to make "historical findings of fact," and lacked "support of any material developed in congressional hearings. . ." *Shurberg*, 876 F.2d at 923-26. This is contrary to the *Fullilove* plurality's holding that "Congress, of course, may legislate without compiling the

kind of 'record' appropriate with respect to judicial or administrative proceedings." 448 U.S. at 478. "Such an intrusion into Congress' legislative deliberations would pose serious separation-of-powers problems, and neither the language nor logic of the Constitution compels such an inquiry." *National Treasury Employees Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984); *see also* *disent* (Wald, C.J.) 13-15.<sup>1</sup>

Moreover, *Fullilove* made clear that Congress need not act on the evidentiary record and findings that Judge Silberman would require. The *Fullilove* Court quoted at length a House report that relied on the "presumption" that "past discriminatory systems have resulted in present economic inequities," 448 U.S. at 465, referred to the "fundamental congressional assumption" underlying the program (*id.* at 487), and upheld "the use of racial and ethnic criteria . . . premised on assumption rebuttable in the administrative process." *Id.* at 489 (emphasis added). A similar legislative history was gathered concerning minority participation in telecommunications. *See Cable Television Industry, Hearings before the Subcommittee on SBA and SBIC Authority, Committee on Small Business, House of Representatives, 97 Cong. 1st Sess. (1981)*

Nor is Congress' power to act on reasonable assumptions confined to the remedial context. Justice Powell's

<sup>1</sup> Judge Silberman belittles Congress' findings of a nexus between ownership and programming as being "in the nature of predictions as to future behavior" rather than historical findings of fact. 876 F.2d 902, 940-42 (emphasis in original). The Judge attempts to impose a new standard of judicial review. When the FCC makes predictive policy judgments, "'complete factual support for the Commission's ultimate conclusions is not required,'" because those judgments are matters for the agency's expertise. *Syracuse Peace Council v. FCC*, 867 F.2d 654, 660 (D.C. Cir. 1989), *quoting FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981). Congress' findings here were based in part on just such a predictive factual judgment by the FCC "about the overall effects of a policy on licensees and others." 867 F.2d at 660.

pivotal opinion in *Bakke* confirmed the ability of a university to take race into account in assembling a diverse student body. That opinion required neither evidence nor Congressional findings to establish the nexus between racial diversity and educational quality. Rather, he wrote, educational excellence is “widely believed to be promoted by a diverse student body,” 438 U.S. at 312 (emphasis added), citing only an article by a university president who said that “[i]n the nature of things, it is hard to know how, and when, and even if, this informal ‘learning through diversity’ actually occurs.” *Id.* at n.48. The contribution of diversity to education rested not on findings or evidence, Justice Powell said, but on “our tradition and experience.” *Id.* at 313.

*Bakke* and *Fullilove* thus support the Court of Appeals holdings that “[r]easonable expectation, not advance demonstration” is sufficient to establish the nexus between ownership diversity and diversity of content. *West Michigan*, 735 F.2d at 610, quoting *TV 9*, 495 F.2d at 938. That nexus has been found not merely by a state university as in *Bakke*, or by the FCC, but by Congress itself. *Bakke* and *Fullilove* thus contradict Judge Silberman’s view of the legislative process, especially when it deals with a compelling governmental interest as unquantifiable as the encouragement of diverse expression. See also *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973) (“great weight [should be accorded] to the decisions of Congress” when legislation implicated fundamental constitutional rights under the First Amendment).

This Court should not disregard specific Congressional intent. If the Court may, at will, annul the legislation of the Congress, and eliminate public policy designed to encourage the development of a robust flow of divergent viewpoints under the First Amendment and the eradication of the impact of racial discrimination under the Fifth Amendment, then our Constitutional system of gov-

ernment, founded on the concept of a true separation of powers, has failed.

### III. THE DISTRESS SALE POLICY IS NOT A SET-ASIDE.

The distress sale policy at issue here is not a set-aside policy like the one presented in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989). Therefore, the holding in *Croson* is distinguishable.<sup>2</sup> Before proceeding to what the distress sale policy does involve, we pause to note what it does not. The Commission’s distress sale policy is not one conceived or applied as “an unyielding racial quota.” 109 S.Ct. 706, 724. Unlike the local program in Richmond that required that 30% of each grant be expended for minority contractors, no percentages, goals or timetables have ever been set or proposed by the FCC or Congress for the distress sale policy.

Additionally, the distress sale policy “was put forward not as a new concept, but rather one building upon prior administrative practice”, *Fullilove* at 449. The practice of “distress sales” existed many years before 1978, when the Congressional Black Caucus petitioned the Federal Communications Commission for a rulemaking to expand

<sup>2</sup> The *Croson* case is most readily distinguishable because it was a plan initiated by local authorities. Of the six Justices who comprised the *Croson* majority, four drew an express distinction between the expansive powers of Congress and the more limited powers of state and local governments. See 109 S. Ct. at 719 (Opinion of O’Connor, J.) (“That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate”); *id.* at 736 (Scalia, J., concurring) *Croson* certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences. In fact, as D.C. Court of Appeals Chief Judge Wald said, “the *Croson* Court’s curtailment of state and local affirmative action programs makes the issue of congressional authority all the more important.” 876 F.2d at 959.

the policy to allow transfers to minorities. The Commission had, permitted distress sales under unusual circumstances, including bankruptcy or physical or mental disability of the licensee. *See e.g. Radio San Juan*, 29 P&F Radio Reg. 2d 607 (1974).

On May 25, 1978, the Commission expanded its policy and declared that in certain limited instances it would permit a broadcast licensee whose license has been designated for hearing to sell their station at a "distress sale" price provided minorities will participate significantly in the new ownership of the station. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 983 (1978).

Also, the distress sale policy differs from a set-aside insofar as the decision to utilize the policy and the procedures created for its implementation are made voluntarily by private parties without mandate by the federal government. Indeed, the majority of stations presented with the precarious situation of potential license revocation opt *not* to utilize the "distress sale policy." Some of them seek and are granted special relief from the Commission enabling them to transfer the license to another concern as a part of a negotiated settlement with the agency. *See Coalition for the Preservation of Hispanic Broadcasting v. FCC*, No. 87-1285 Slip Op. at 6-9 (D.C. Cir. Jan. 12, 1990). Other broadcasters whose licenses are in jeopardy seek relief under the Commission's long standing "Second Thursday" doctrine which permits the broadcaster to sell its station for "the value of the unlicensed equipment." *Second Thursday Corporation*, 22 FCC 2d 515 (1970), recon. granted 25 FCC 2d 112 (1970); *Northwestern Broadcasting Corporation (WLTH)*, 65 FCC 2d 66 (1977).

In fact, not every broadcaster can even qualify for distress sale relief, because the policy is available only where no other party has filed a timely competing ap-

plication. *See Clarification of the Distress Sales Policy*, 44 RR 2nd 479 (1978).

What may best illustrate the flexibility and voluntary nature of the distress sale policy (as contrasted with a rigid set-aside) is the infrequency of its utilization. While over the last dozen years nearly 9,000 stations have been sold, and nearly 100 licenses for radio and television stations were "designated for revocation hearing or . . . have been designated for hearing on basic qualification issues" (thus placing them in the pool eligible for distress sales relief), only 39 have elected to transfer their license via this policy. The remaining majority of licensees in jeopardy have either elected to fully defend their questionable practices at hearing (as Faith Center did with their other licenses prior to electing to effectuate a distress sale to Astroline of the WHCT-TV license), transfer the station by sale as part of a negotiated settlement. *See, e.g., RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057, 5062 (1988), or seek special relief from Congress. *See, e.g., Channel 9 Reallocation (WOR-TV)*, 53 RR 2d 469 (1983), *aff'd sub nom. MultiState Communications, Inc. v. FCC*, 728 F.2d 1519 (1984).

The distress sale policy is as much an agency alternative in dealing with questionable licensees as it is a program to aid minorities. The Commission's decision—which carries out a Congressional mandate—to impose a severe financial penalty on Faith Center and promptly transfer the license to a qualified broadcaster should not be reversed. The court customarily allows administrative agencies much latitude in choosing among available remedies and penalties. *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958).

Thus, the distress sale policy does not have the characteristics of a set-aside program. Rather, it is more akin to a federal initiative that offers private sector financial incentives to foster the legitimate government's

interest in diversifying control over broadcast programming, and avoiding "time consuming and expensive hearings". *Policy Statement on Minority Ownership*, 68 FCC 2d 979, 983 (1978).

Rather than place the government in the middle of every commercial transaction like that high level of regulation needed to maintain an effective set-aside program, the government's role in effectuating a distress sale is minimal, and largely centered around scrutinization only "to avoid abuses" and to determine on a case-by-case basis "how the sale would further the goals of fostering "diversified programming which is the key objective not only of the Communications Act of 1934 but also of the First Amendment". *Policy Statement on Minority Ownership, supra*, 68 FCC 2d at 983.

It was the Commission's intention to reduce government regulation and intervention by adopting the distress sale policy. In striking the balance in favor of expanding the distress sale policy the Commission concluded that "the avoidance of time consuming and expensive hearings will more than compensate for any diminution in the license revocation process as a deterrent to wrongdoing." *Policy Statement on Minority Ownership*, 68 FCC 2d at 981.

The Commission designed the distress sale policy so that the change in control of a station would largely be motivated by marketplace forces, rather than become entangled in the regulatory web of a comparative hearing. According to its instruction published by its Consumer Assistance and Small Business Division:

"[t]he transaction begins when the buyer and seller each submit an appraisal of the station's fair market value. The average of the two is then used to determine the purchase price ratio to the fair market. If the difference between the appraisals, exceeds 5% of the average of the appraisals, the seller and buyer then seek a third appraisal. The average of all three

appraisals will then be used to calculate the ratio. The purchase price must equal 75% or less of the fair market value." "Distress Sales" published by Consumer Assistance and Small Business Division, FCC Office of Public Affairs, March, 1989.

In sum, the distress sales policy is not a set-aside and therefore need not be analyzed under "the most exacting standard of review" applied when a program mandates the allocation of federal funds according to inflexible percentages solely based on race or ethnicity. *Croson*, at 724. This is particularly true when dealing with programs specifically mandated by Congress. In *Croson*, the Court acknowledged that the principal opinion in *Fullilove* "did not employ 'strict scrutiny' or any other traditional standard of equal protection review . . . [in] appropriate deference to the Congress, a co-equal branch . . ." *Croson* at 717.

#### IV. THE DISTRESS SALE PROGRAM IS NARROWLY TAILORED.

Although the distress sale policy should not be held to the strict scrutiny test, if it is, the policy will meet the test because it is narrowly tailored. Two judges on the Court of Appeals found the distress sale program's means inadequately tailored to its ends. Unreasonable demands for narrow tailoring, however, produce strict scrutiny that is "strict in theory, but fatal in fact." *Fullilove*, 448 U.S. at 507 (Powell, J.).

The deference this Court owes to a congressionally-mandated initiative extends to its means as well as its end. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). The Court in *Fullilove* "stress[ed] the limited scope of our inquiry" in dealing "not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress." *Id.* at 480, 483. Remedial plans need not "be limited to the least restrictive means of implementation." *Id.* at 508; accord *United States v. Paradise*, 480 U.S. 149, 184 (1987). And "[i]t is not a constitutional defect" that a

program "may disappoint the expectations of nonminority firms." *Fullilove*, 448 U.S. at 484.

Under *Fullilove*, a key to the constitutionality of a Congressional program is the availability of an administrative mechanism that offers "reasonable assurance" that its purposes will be accomplished and "that misapplications of the program will be promptly and adequately remedied administratively." 448 U.S. at 487. Such a mechanism exists at the FCC: every distress sale application requires the specific approval of the FCC. MacKinnon Op. 10 n.16. Before Astroline's application was granted, private and public concerns were offered the opportunity to file comments or opposition to the request for special relief. Numerous petitions to deny were filed against Astroline's application. Each was thoroughly examined by the Commission, and ultimately denied. This is the type of agency review approved in other contexts, because "[administrative procedures will be adequate if the decision-making body has the opportunity to consider the appropriateness of awarding each contract on the basis of race-conscious preferences." *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 937 n.30 (9th Cir. 1987).

The FCC has said, for example, that it will be alert to ferret out distress sale purchasers that are merely minority "fronts." *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d at 855; see *Fullilove*, 448 U.S. at 487-88 ("There is administrative scrutiny to identify and eliminate from participation in the program MBE's who are not 'bona fide' . . . spurious minority-front entities can be exposed.") Shurberg could and did raise such an objection here. *Faith Center, Inc.*, 99 FCC 2d at 1172-73. Shurberg also could and did argue that the license should be denied distress sale treatment on the basis of competing public interest considerations, e.g., the interest in license competition rather than minority owner-

ship. *Id.* at 1167-70. The FCC accepted this argument in part, by ruling that if the assignment to Astroline were not consummated, a comparative proceeding open to all comers would promptly commence. *Id.* at 1170. Far from reserving the license for a minority buyer, the FCC thus made an individualized determination.

Narrow tailoring requires the agency to consider alternative race-neutral means of achieving a compelling governmental interest. *United States v. Paradise*, 480 U.S. 149, 171 (1987). The FCC promulgated "ascertainment" rules in an unsuccessful attempt to encourage minority participation in programming. *Public Notice, Statement of Policy on Minority Ownership at Broadcasting Facilities*, at 3 (FCC 78-322, released May 25, 1978 (Mimeo No. 2734)). Also, in 1978 the Commission relaxed its requirement that an applicant be able to show enough financing to operate a new station for twelve months without commercial revenue. The new regulation required only a showing that the new operator could operate for three months, thus reducing a barrier to entry. In so doing, the Commission hoped that this "race-neutral" policy would significantly enhance minority ownership. *Financial Qualifications Standards for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978); see also, 87 FCC 2d 200, 201 (1981). Unfortunately, it did not.<sup>3</sup> Therefore, there remained the need for a flexible race-conscious program to encourage diversity and to curtail

<sup>3</sup> Congress also explored "racially-neutral" ways to increase minority ownership. As advertising is the life blood of commercial broadcasters, Congress examined the flow of federal ad procurement and concluded "*Federal Use of Small Disadvantaged Subcontractors is Minimal.*" See Federal Advertising, GAO/RCD, 89-54, June, 1989. ("Twelve federal agencies procured advertising services in fiscal year 1986; their total advertising budget in 1986 was approximately \$166 million. Of this amount, approximately 1 percent was spent with small disadvantaged firms as prime contractors. . . . In fiscal year 1986, DOD, the largest buyer of advertising services (97% of federal budget), did not use small disadvantaged advertising and media firms as prime contractors.")

the underrepresentation of women and minorities in the ownership ranks of the media. The First Amendment forbids direct regulation of program content; the alternative of directly requiring diverse programming is foreclosed.<sup>4</sup> "Diversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." *National Citizens Commission for Broadcasting*, 436 U.S. at 796-97 (citation omitted.)

A narrowly tailored program also should not unreasonably limit the opportunities of innocent nonminorities. *Local 28 of Sheet Metal Workers' International Association v. EEOC*, 106 S.Ct. 3019 (1986). Some burden on nonminorities, however, is acceptable and inevitable in any race-conscious remedial program. "[A] sharing of the burden' by innocent parties is not impermissible." *Fullilove*, 448 U.S. at 484; see also *Wygant*, 476 U.S. at 280-81. Unlike the laid-off teachers in *Wygant*, Shurberg did not lose his job, or a station license, but simply the opportunity to contend—along with an indeterminate number of "other interested parties" (99 FCC 2d at 1170)—for the WHCT-TV license. Shurberg had no assurance of gaining the license in a comparative hearing; Faith Center might have retained it, or another party (including Astroline) could have emerged victorious. Judge Silberman characterizes Shurberg's opportunity as "unique" because "[i]t is a Hartford station Shurberg wants. . ." Silberman Op. 33. But nothing in the Supreme Court's affirmative action decisions supports measuring the burden on nonminorities by the particularity of their desires. The broadcast industry assuredly was, and remains, open to Shurberg; he was, and remains, free to purchase or compete for a broadcast station in Hartford or elsewhere. Indeed, Astroline's application

<sup>4</sup> See, *Hart*, "The Case for Minority Broadcast Ownership," *Gannett Center Journal* 54 (Winter 1988).

was up for renewal in 1989, and Shurberg failed to file a competing application, although six other competing applications were filed.

The distress sale policy also benefits nonminorities. It provides direct economic relief to an incumbered licensee that could otherwise suffer far greater loss should its license be revoked after the hearing. The policy also saves considerable administrative resources by eliminating the lengthy hearing process.

The Commission, in granting the transfer of WHCT-TV to Astroline, concluded that this was an appropriate case in which Faith Center (a problem broadcaster that had lost its other licenses) should be removed from broadcasting, but without the harshness attending an outright denial of its renewal applications. The Commission also found that the settlement agreement served the public interest by simplifying a complex case, saving administrative costs, and removing a "cloud" of uncertainty that can adversely affect a station's performance. These are the same benefits recognized by the Court of Appeals in *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, No. 87-1285, slip op. at 7, 9 (D.C. Cir. Jan. 12, 1990).

The distress sale policy is thus narrowly tailored because it offers "reasonable assurance" that diversity of program content will be enhanced and any flaws in the policy will be handled administratively. Congress' findings that diversification of mass media is a compelling public need, and that increased minority ownership of broadcast stations would help significantly to fill that need, are entitled to recognition by this Court as validating the distress sale policy, which Congress expressly mandated as one of the means of fostering enhanced minority ownership and program diversity.

Additionally, the Congress and FCC have considered (and in fact implemented) race-neutral means of achieving these goals but they have not fully met the objectives.

Therefore, the limited infringement on non-minorities that the distress sale policy may impose is reasonable. Finally, the policy offers a number of administrative and procedural benefits and safeguards which additionally narrow the effects of the racial impact of this policy. In sum, the policy is narrowly tailored and should be upheld even under the strict scrutiny analysis.

### CONCLUSION

The distress sale policy has been mandated by Congress, serves compelling public needs including the vitally important one of diversification of broadcast programming, is narrowly tailored, was adopted as a race-conscious remedy only after other, race-neutral remedies failed to achieve the objective, and does not excessively burden affected nonminority persons. Therefore, the decision of the Court of Appeals invalidating the distress sale policy as unconstitutional should be reversed.

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February 9, 1990

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JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION  
OF BLACK OWNED BROADCASTERS, INC.  
AMICUS CURIAE IN SUPPORT OF PETITIONER

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**No. 89-700**

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BRIEF OF THE NATIONAL ASSOCIATION OF  
 BLACK OWNED BROADCASTERS, INC.  
 AMICUS CURIAE IN SUPPORT OF PETITIONER

---

**INTEREST OF AMICUS CURIAE**

This brief is submitted by the National Association of Black Owned Broadcasters, Inc. ("NABOB") as amicus curiae. Amicus has secured the consent of each party to the filing of this brief. Amicus supports the position of petitioner in this case and urges reversal of the decision below.

NABOB is the trade association representing the interests of the 180 commercial radio and 18 com-

mercial television stations across the country owned by African Americans. NABOB has two principle objectives: to increase the number of African American owners of radio and television stations, and to improve the business climate in which African American owned radio and television stations operate.

Some of NABOB's members have acquired stations through the distress sale policy and other members may acquire stations pursuant to the distress sale policy in the future if that policy is found to be constitutional by the Court. Therefore, NABOB and its members have a very significant interest in the outcome of this proceeding and can provide to the Court the perspective of many potential and past beneficiaries of the Federal Communications Commission ("FCC") policy at issue here.

#### SUMMARY OF ARGUMENT

The FCC's minority distress sale policy serves an important public interest benefit by providing an opportunity for minorities to become station owners. Minority station owners bring diversity to broadcast programming by bringing a minority perspective to programming decisions. Minorities were excluded from participation in the broadcast industry at its inception, due to both *de jure* and *de facto* discrimination, and it is unrealistic to suggest that a color-blind approach to FCC policies is sufficient to assure diverse ownership of the nation's broadcast facilities. The potential displeasure of nonminorities is not an adequate reason for eliminating the minority distress sale policy. While some nonminorities may stigmatize minorities because of the distress sale policy, minorities have lived with and continue to live with much worse

stigmas, many of which have been created or fostered by the nonminority controlled media.

A Congressionally approved racial preference policy such as the distress sale policy should not be reviewed by this Court pursuant to the "strict scrutiny" standard, but should be reviewed according to the less stringent *Fullilove* standard. However, the distress sale policy is constitutional even under the strict scrutiny standard, because the distress sale policy serves a compelling interest and is narrowly tailored to serve that compelling interest.

#### ARGUMENT

##### I. THERE ARE IMPORTANT PUBLIC INTEREST BENEFITS WHICH WILL RESULT FROM A DETERMINATION THAT THE DISTRESS SALE POLICY IS CONSTITUTIONAL

In order to place this case in proper perspective, it is necessary for the Court to answer two questions: What overall public interest benefit does our nation obtain by a determination that the distress sale policy is constitutional? What overall public interest harm might our nation incur from a determination that the distress sale policy is constitutional?

On the benefit side, we must begin with a clarification of a key point raised by Judge Silberman below. In his separate opinion below, Judge Silberman simplistically suggested that the societal benefit which is achieved by the implementation of the distress sale policy is "minority programming." See *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 922-923 (D.C. Cir. 1989) (separate opinion of Silberman, J.). This characterization is misleading and patronizing. Although many minority owners have used

the airwaves to help eliminate the dearth of minority oriented programming<sup>1</sup>, to suggest that their contributions have been limited to minority programming is to do an injustice to the efforts of these broadcasters. Minority owners contribute to the overall commerce of their respective communities in three crucial arenas: increased employment opportunities for minorities in management as well as staff positions; increased business opportunities for ancillary minority businesses as well as minority vendors and suppliers; and increased training opportunities for minority students.

Minority station owners also bring to the airwaves diversity of control over programming decisions. It is narrow-minded to presume that all programming which appeals to minorities is "minority programming." Similarly, programming which might be described as "minority programming" often appeals to nonminorities. (The long-running number one television program, "The Cosby Show," graphically illustrates this phenomenon.)

The minority owner brings to the airwaves a minority perspective on programming, which has been lacking in an industry dominated by white males. This input is most influential in the news area. While a responsible broadcaster does not consciously slant news stories to appeal to any particular racial audi-

<sup>1</sup> The Congressional Research Service has determined that minority station owners, particularly African American owners, tend to do minority oriented programming and that there is a nexus between minority ownership and minority oriented programming. Congressional Research Service, Library of Congress, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (1988) at CSR-13, CSR-27.

ence, all broadcasters must decide daily what is "news." Whether to carry a story about a local councilman's speech on drug abuse instead of a report on political developments in Eastern Europe, whether to do a thirty second story or a two minute story on an abortion march, whether to report an incomplete story on possible political corruption or to hold it until additional research can be done, are the types of decisions made several times each day by broadcasters. These are subjective decisions. The personal background of the person making these decisions necessarily will influence the decisions he or she makes. The results of these news decisions will often go a long way toward shaping public awareness and ultimately public opinion about the issues and people in the news.

In a nation built upon the premise of "free speech" and the sanctity of allowing differing views to be heard, it is a failure of national broadcast policy that diverse opinions rarely can be found on the nation's airwaves. Through its minority ownership policies, which are designed to provide and to preserve diversity, the FCC represents the only government outpost still true to the tenets of the First Amendment and of Congress's intent when it formulated the Communications Act of 1934. While the societal benefits of a free press are not being challenged directly in this proceeding, the FCC's recognition that a free press must include outlets of expression for all members of a pluralistic society is being challenged. The FCC has recognized that certain segments of our society historically have been denied access to the exercise of their free speech rights and that such denial harms all of society because the entire society has

been denied its rights to experience and consider differing opinions.

The FCC, through its distress sale policy, attempted to facilitate minority voices in the exercise of their First Amendment freedoms through participation in ownership of stations and control of programming decisions. In order to accomplish this, the FCC embraced a very basic principle of business and democracy: ownership is control.

Those concerned about the possibility of public interest harm resulting from upholding the distress sale policy often raise two issues: (1) Does this policy create reverse discrimination against nonminorities? (2) Does this policy stigmatize minorities? In *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), Justice O'Connor, writing the primary opinion, was clearly concerned about both of these issues. Considering first the issue of reverse discrimination, any policy which allocates a finite resource between competing interests will always leave one of those interests without that resource. Every time Congress decides to make the age old choice between "guns or butter," it deprives some interest group of a resource. However, allocation of resources is not discrimination, it is the making of a choice. As is clear from the discussions elsewhere in this brief, Congress has a compelling interest in making the choice to allocate broadcast resources so as to encourage minority ownership. More importantly, the choice at issue in this proceeding is one which Congress would not have been required to make were there not a history of racial discrimination in American society.

However, the above answer does not address a side issue to the reverse discrimination issue. That issue

is: Does this policy create a public perception of reverse discrimination? In other words, does this policy inflame racial tensions by making nonminorities feel that minorities are being treated better than nonminorities? The answer to this question is very subjective. In all candor, the answer may be that some nonminorities do feel this way. However, the possibility of those feelings cannot deny the fact of or erase the impact of a history of slavery and subsequent society-wide discrimination endured by African Americans. The court cannot ignore the evil of a history of racism which has created the need for the policy we must defend herein. In the face of such a well documented and historical pattern of racial misconduct such as exists in the United States, it is a cruel twist of the intent of the Thirteenth and Fourteenth Amendments to even suggest that a policy as benign as the distress sale policy could result in reverse discrimination. Slavery did exist. "Jim Crow" laws did exist. "Separate but equal" did exist, until this Court finally overturned that injustice. We cannot sweep away, under some vague notion of "possible" reverse discrimination, the vestiges of those documented patterns of racial misconduct, perhaps in the faint hope that memories of this sad past will simply fade away. The distress sale policy is an effort to face the realities of our racial history head on and to attempt some recompense. The Court cannot allow potential hostility to its decision to cloud the obvious public interest benefits to be achieved from upholding the constitutionality of the distress sale policy.

Finally, we note that the Court may be concerned about the societal impact of stigmatizing minorities. As the trade association of African American owners

of broadcast facilities, NABOB is uniquely qualified to address the issue of stigmatizing minorities in the context of the distress sale policy, because some NABOB members have acquired broadcast stations through use of the distress sale policy.

In addressing the issue of stigmas the Court must begin by recognizing that stigmas are not new to African Americans, or to most racial minorities in America. Every day African Americans see and hear in the broadcast media images and commentaries which negatively stigmatize all African Americans. We bear a stigma which in Boston allowed Charles Stuart, an apparent murderer, to essentially use racism to cloak his crime. The majority controlled media were used by Stuart to create a climate of hysteria and racial tension which lasted for weeks. Perhaps, if there had been one African American controlled television station in that city, objectivity, and maybe the truth, might have found the light of day much sooner. The Stuart case is an extreme example of the daily situation in which African Americans bear the stigma of the Willie Horton's of the world, the rapists, the crack dealers, the crack users, the robbers, and the murderers. The many positive accomplishments of African American businessmen and businesswomen, politicians, doctors, educators and other professionals are rarely "news worthy" in the eyes of those who control the major communications facilities in this country.

It may be that there are those who would stigmatize those minorities benefiting from the FCC's minority distress sale policy. However, as owners of broadcast stations, we know that the broadcast industry evolved in the early 20th century at a time

when African Americans lived under *de jure* segregation in the south and *de facto* segregation in the north. Therefore, African Americans had no equal opportunity to become the leaders of that industry, which was mature before its doors were ever open to us. By the time the doors were opened, not only racial discrimination but its tandem economic stratification prevented our advancement. Therefore, any potential stigma which may attach to acquiring a station through the distress sale policy pales to nothingness when compared to the stigma of having to watch our community portrayed, spoken for, spoken to and analyzed by voices which are not our own. The Court need not look to protect us from the stigma of receiving preferential treatment. Rather, we request that the Court protect our children from growing up in a society where the broadcast industry does not reflect meaningful ownership and programming control by African Americans.

## II. THE STRICT SCRUTINY STANDARD OF REVIEW APPLIED IN THE *CROSON* CASE IS NOT APPROPRIATE FOR REVIEW OF THE FEDERAL COMMUNICATIONS COMMISSION'S CONGRESSIONALLY APPROVED DISTRESS SALE POLICY

In *Croson*, this Court articulated the principal issues it will consider when balancing interests between the Fourteenth Amendment's guarantee of equal treatment to all citizens and the use of racial preference policies to ameliorate the effects of past discrimination on the opportunities enjoyed by members of racial minority groups in our society. In writing the principal opinion for the majority in *Croson*, Justice O'Connor relied heavily upon the Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Justice O'Connor explained that "Congress, unlike any State

or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Croson*, 109 S. Ct. at 719. She added, "The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principals of equality and to adopt prophylactic rules to deal with those situations." *Id.* (emphasis in original). Thus, Justice O'Connor began from the proposition that "Congress may identify and redress the effects of society-wide discrimination." *Id.* Justice O'Connor stated that this substantially distinguished the facts of the *Croson* case from those of the *Fullilove* case:

We do not, as Justice MARSHALL's dissent suggests, find in Section 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all—Section 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; Section 5 is, as the dissent notes, 'a positive grant of legislative power' to Congress. Thus, our treatment of an exercise of Congressional power in *Fullilove* cannot be dispositive here [in *Croson*].

*Id.* at 720 (citations omitted).

Moreover, in recognition of Congress's unique power in this area, Justice O'Connor also recognized that the "strict scrutiny" standard is not appropriate for review of Congressional action with respect to race-conscious distinctions. Justice O'Connor's opinion recognized that the "strict scrutiny" standard of review is to be reserved solely for State and political

subdivision legislative actions based on race. *See Id.* at 719. Thus, Justice O'Connor noted without criticism that the Court in *Fullilove* did not specify a "strict scrutiny" standard of review for Congressional action. As Justice O'Connor observed:

The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time, "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."

*Id.* at 717-718.

Justice O'Connor then made the following observation concerning the principal opinion in *Fullilove*:

The principal opinion asked two questions: first, were the objectives of the legislation within the power of Congress? Second, was the limited use of racial and ethnic criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause?

*Id.* at 717 (citation omitted).

Thus, applying *Fullilove*, the Court's review of the Commission's implementation of the distress sale pol-

icy should focus similarly, i.e.: (1) is the implementation of the policy by the Commission consistent with Congress's mandate that the Commission act to promote ownership of broadcast facilities by racial minorities, and (2) was the limited use of racial criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause? Under the "strict scrutiny" standard the Court would inquire as to whether there was (1) a "compelling interest" for Congress to adopt a racial classification and (2) whether the means used to address that compelling interest were "narrowly tailored" to address that compelling interest. *See Id.* at 721. Although *Croson* did not hold that the "strict scrutiny" standard should be applied to Congressional action, as we shall demonstrate below, the minority distress sale policy meets the more stringent "strict scrutiny" standard of review.

### III. THE CONGRESS HAS A COMPELLING INTEREST IN ENCOURAGING OWNERSHIP OF BROADCAST STATIONS BY RACIAL MINORITIES TO ENHANCE THE DIVERSITY OF BROADCAST VOICES

#### A. Congress has Repeatedly Determined that the Distress Sale Policy Serves a Compelling Interest

In the decision below, Chief Judge Wald issued a well-reasoned, detailed dissent setting forth the compelling interest at issue in this case. *See Shurberg*, 876 F.2d at 934. Discussing the decisions of this Court in *Croson*, *Fullilove*, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Judge Wald pointed out that a majority of the Court has squarely held that the remediation of prior racial discrimination is a sufficiently compelling interest to

justify the use of racial preferences. Judge Wald added that Justice Powell's opinion in *Bakke* also recognized as compelling the state's interest in promoting diversity within the context of higher education. Judge Wald pointed out that in the D.C. Circuit it has been held that use of a minority racial preference by the FCC in comparative licensing hearings is a constitutional means of obtaining a diverse mix of broadcasters. *See Shurberg*, 876 F.2d at 935 (citing *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985)). Moreover, as the following description of the history of the FCC's minority ownership policy demonstrates, and as Judge Wald recognized, Congress has repeatedly approved use of racial preference policies by the FCC, including the continued use of the distress sale policy. *See Shurberg*, 876 F.2d at 938-941.

The FCC is a creation of Congress and it derives its authority from that body. In 1982 the Congress directed the FCC to provide a minority ownership preference when it awards broadcast licenses by lottery. In so doing, the Conference Committee stated in its report:

The underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of programming content. This diversity principle is grounded in the First Amendment.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

The Conference Committee added:

An important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities—groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.

*Id.* at 43.

In 1987, Congress acted to prevent the FCC from repealing or altering these minority ownership policies. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); *See also* H.R. Conf Rep. No. 498, 100th Cong., 1st Sess. 504 (1987). The Senate Appropriations Committee, which reported out this provision, explained:

The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987).

Congress extended the prohibition through fiscal year 1989, *see* Departments of Commerce, Justice, & State, the Judiciary, and Related Agencies Appro-

priations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217, and has recently renewed that extension for the current fiscal year, 1990. *See* Departments of Commerce, Justice, & State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021.

Moreover, not only has the Congress legislated in this area, but it also repeatedly has held hearings to monitor the FCC's implementation of the minority ownership policies. *See, e.g., Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. Pt. 1, at 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations: Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media: Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983).

The Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation held hearings on September 15, 1989 to examine further the issue of minority ownership of broadcast stations. *See Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished).

Thus, it is clear that the FCC's distress sale policy was established and has been applied under the direction of the Congress to foster what Congress has determined is a compelling federal interest. Indeed, Judge Silberman in his separate opinion below conceded that, "Congress has not disapproved the use of racial preferences as a means of carrying out the Commission's view of the 'public interest,' and has in fact authorized their use in certain licensing decisions." *Shurberg*, 876 F.2d at 909-10.

**B. The FCC Developed an Extensive Record Demonstrating the Compelling Interest in Promoting Diversity of Ownership Through Use of the Minority Distress Sale Policy**

The FCC has historically recognized that diversity of control of the media of mass communications constitutes a primary objective of its broadcast licensing scheme. See *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 5 Rad. Reg. 2d 1901, 1908 (1965) (hereinafter *Comparative Policy Statement*). Indeed, the Commission recognized in the *Comparative Policy Statement* that "maximum diffusion of control of the media of mass communications" was one of two primary objectives toward which the comparative process should be directed. *Id.* In doing so the Commission adopted the Supreme Court's rationale that the First Amendment, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* n.4 (quoting *Associated Press v. United States*, 326 U.S. 1 (1945)).

Despite the national importance of diversity of ownership of mass media, until adoption of the FCC's 1978 *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978) (here-

inafter *Policy Statement*), minorities, particularly African Americans, had little access to broadcast properties as owners. When Congress passed the Radio Act of 1927, African Americans, due to the vestiges of slavery and *de jure* and *de facto* segregation, had no opportunity to own radio stations. No American broadcast station was owned by an African American until Jesse B. Blayton purchased an existing station, WERD(AM), in 1949.<sup>2</sup> It was not until 1956 that a company owned by African Americans was granted a construction permit to build a new broadcast station.<sup>3</sup> It was against this backdrop that the FCC's minority ownership policies were developed.

In 1978, the FCC announced the adoption of the distress sale policy in its *Policy Statement*. In adopting the *Policy Statement* the Commission described at length the need for the distress sale policy. The Commission explained that in 1968 it first articulated the need to assure that broadcast licensees did not discriminate against racial minorities in their employment practices. See *Petition for Rulemaking to Request Licensees to Show Discrimination in their Employment Practices*, 13 F.C.C.2d 766 (1968). In 1968 the Commission stated:

we simply do not see how the Commission could make the public interest findings as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the National Policy.

<sup>2</sup> M. Muhammed, *Minority Participation in Broadcasting*, Dollars & Sense, May/June 1979, at 18.

<sup>3</sup> *Id.*

*Id.* at 767.

A year later, the Commission adopted rules which prohibited discrimination by broadcast licensees in employment on the basis of "race, color, religion or national origin" and also required that "equal employment opportunity in employment . . . be afforded by all licensees or permittees . . . to all qualified persons." *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969). In 1970, the Commission adopted rules requiring most broadcast licensees to file annual employment reports and to file a written equal employment opportunity program when filing certain application forms. See *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970). In 1975, the Commission reiterated and clarified its policy on employment discrimination. See *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 F.C.C.2d 354 (1975). In 1976, the Commission adopted a Model EEO Program to be followed by all broadcast licenses. See *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976).

The Commission explained in its *Policy Statement* that it had taken other actions to assure that the needs, interests and problems of a licensee's community, including the minorities within that community, were both ascertained and treated in the programming of the licensee. Under the Commission's ascertainment guidelines, broadcast licensees were required to contact minorities, as well as nineteen other specified groups in the communities they served, to determine community interests so that the licensee could present programming responsive to those in-

terests. See *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1976).

After recounting this long list of very careful and considered measures to increase minority input into broadcast programming the Commission then pointed out the inadequacy of these measures:

While the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the nonminority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.

*Policy Statement*, 68 F.C.C.2d at 981.

In making this determination, the Commission explained that it was basing its conclusion on specific findings it had made in its *Report on Minority Ownership in Broadcasting* (May 17, 1978) (hereinafter *Minority Ownership Task Force Report*). The *Minority Ownership Task Force Report* developed much of its information from testimony given by witnesses at a two-day minority ownership conference held April 25-26, 1977 at the Commission. In its *Minority Own-*

*ership Task Force Report* the Commission recognized the acute under representation of minorities among broadcast station owners (at that time it was less than one percent, while today it is still less than two percent). The conference was held to provide the participants with an opportunity to identify obstacles confronting minorities seeking to obtain broadcast licenses and to define possible means of overcoming the obstacles to ownership. *Minority Ownership Task Force Report*, at 1. Conference participants included representatives from diverse races, professions, government and private enterprise. *Id.*

In its *Minority Ownership Task Force Report*, the Commission began by noting that:

The touchstone of the Communications Act of 1934, as amended, is 'to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide radio communications service ...' In 1934 when the Communications Act was signed into law, public policy on the assimilation of minorities into the communications industry was nonexistent. Indeed, Blacks, Latin Americans, Asians and American Indians were isolated from the mainstream of American life by generations of racial discrimination and disadvantage.

*Id.* at 2-3 (footnotes omitted).

The Commission went on to state:

In recent years, all Americans witnessed the struggle to eliminate the vestiges of racial discrimination in the nation. The mere dismantling of formal racial barriers, however,

has not solved all problems created by generations of racial prejudice. Nor has it brought minority racial groups fully into the mainstream of our pluralistic society.

Centuries of discrimination have isolated racial minorities from society in general, not only by substantially different attitudes and experiences, but also by continued economic disadvantage. Racial prejudice has prevented racial minorities from being assimilated into the mainstream of society. This prejudice, spanning centuries, has created not only a physical distance but a psychological distance between racial minorities and the members of society.

Generations of discrimination have created a form of racial caste. In the view of the panelists a direct result of the general societal discrimination has been the under representation of these minorities in the ownership of broadcast stations as well as other communications facilities. Various panelists suggested that if the inequities of the past are to be corrected they must be treated by measures which go beyond mere 'neutrality'.

The courts and Congress have realized that in order to deal with the lingering vestiges of racial discrimination, remedial measures taking race and other factors into account are constitutionally permissible. A number of panelists believe that an affirmative policy to remedy the effects of past societal discrimination is necessary in view of the present

level of minority participation in broadcast ownership.

*Id.* at 6-8 (footnotes omitted).

The Commission went on to discuss some of the key obstacles the conference participants described.

Various panelists noted that buying an attractive broadcast property is especially difficult because potential minority owners are excluded from knowledge of the availability of such stations. In the opinion of the panelists, information from brokers seems to be reserved for certain clients. The panelists characterized this system of exclusion as the "old boy network". This is significant because, once the owner of a station has agreed to sell, and a buyer is found qualified, the Commission is prohibited from considering whether any third party may be better qualified.

*Id.* at 9 (footnote omitted).

Analyzing the findings of its *Minority Ownership Task Force Report* in the *Policy Statement*, the Commission stated:

It is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum. And, of course, we have long been

committed to the concept of diversity of control because 'diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.'

What is more, affecting programming by means of increased minority ownership—as is also the case both with respect to our equal employment opportunity and ascertainment policies—avoids direct government intrusion into programming decisions.

*Policy Statement*, 68 F.C.C.2d at 4 (quoting *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965)).

The Commission then concluded:

We believe that diversification in the areas of programming and ownership—legitimate public interest objectives of this Commission—can be more fully developed through our encouragement of minority ownership of broadcast properties. In this regard, the Commission is aware of and relies upon court pronouncements on this subject.

*Id.* at 4 (citations omitted).

The Commission then proceeded to announce the extension of its distress sale policy so as to allow a licensee in danger of having its license revoked to assign its license to a minority owned applicant:

[I]n order to further encourage broadcasters to seek out minority purchasers, we will permit licensees whose licenses have been des-

ignated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, but before the hearing is initiated, to transfer or assign their licenses at a "distress sale" price to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other obligations.

While we normally permit distress sales when the licensee is either bankrupt or physically or mentally disabled, there is precedent for such sales based on other grounds . . . . We contemplate grants of distress sales in circumstances similar to those now obtaining except that the minority ownership interests in the prospective purchaser will be a significant factor. The parties involved in each proposed transaction will be expected to demonstrate to us how the sale would further goals on which we are today basing the extension of our distress sale policy. All such transactions will be scrutinized closely to avoid abuses.

*Id.* at 7.

The above detailed description of the steps taken by the FCC to encourage minority involvement in programming decisions demonstrates clearly that the FCC developed a full record upon which it based its determination that there was a compelling interest in promoting diversity of ownership by minorities through use of the distress sale policy.

#### **IV. THE DISTRESS SALE POLICY IS NARROWLY TAILORED TO ACHIEVE DIVERSITY OF CONTROL OF BROADCAST STATIONS THROUGH ENCOURAGEMENT OF MINORITY OWNERSHIP**

The preceding description of the record developed by the FCC and repeatedly approved by Congress demonstrates not only the compelling interest being addressed by this policy, but also demonstrates that the policy is narrowly tailored to serve that compelling interest. The preceding description of the FCC's race-neutral efforts, beginning in 1968, to encourage employment of minorities by broadcast licensees, and to require ascertainment of minority programming interests by all licensees, demonstrates that the distress sale policy was adopted only after these other extensive race-neutral efforts failed to produce any significant results in diversifying the control of broadcast programming decisions.

Moreover, the distress sale policy is also narrowly tailored to minimize any burden on nonminorities. First, it is only through Commission action (designation of a license for a revocation hearing) that the circumstances which would permit a distress sale can arise. Second, the distress sale policy is elective. No licensee is ever obligated to sell to a minority. Third, the distress sale policy does not establish any quotas. Indeed, in practice, the policy has had limited impact, because it has been available so infrequently. From 1979 to 1987 only 38 distress sales were approved by the Commission, while the Commission approved 9000 sales of broadcast stations. Thus, distress sales represented 0.4% of station sales during that time period. *See FCC C.A. Pet. for Rehearing and Suggestion*

for Rehearing En Banc, at 11-12. Finally, the distress sale policy does not deprive anyone of a vested right. Persons interested in acquiring a station in a license revocation hearing have no rights to the specific license at issue in that hearing. Given that only 0.4% of broadcast stations have been sold using this policy since its inception, the burden of not being able to purchase a station in a distress sale situation impacts nonminorities only negligibly.

Thus, the distress sale policy is analogous to the *Fullilove* set-aside plan in that it has only a small impact on nonminorities. See *Fullilove*, 448 U.S. at 484-85 n.72 (Burger, C.J.). In *Fullilove* Chief Justice Burger noted that it was "not a constitutional defect in [the minority business enterprise set-aside provision] that it may disappoint the expectations of non-minority firms." *Id.* at 484. He added that this was especially true given that the 10% minimum minority participation requirement translated into only 0.25% of the annual expenditure for construction work in the United States. *Id.* at 484-85 n.72. Therefore, the slight 0.4% impact on prospective station applicants which results from operation of the distress sale policy is consistent with the level of impact found permissible in *Fullilove*.

Similarly, the degree of impact on specific applicants, such as Shurberg Broadcasting of Hartford, Inc. ("Shurberg"), does not cause the policy to fail under constitutional scrutiny. In *Wygant* the Court struck down a preferential layoff plan, but distinguished between preferential layoff plans and hiring plans. *Wygant*, 476 U.S. at 282-83 (Powell, J.). In his *Wygant* opinion, Justice Powell observed that, "Denial of a future employment opportunity is not as intrusive

as loss of an existing job." *Id.* Indeed, as Judge Wald recognized below, if the qualifications of the prior licensee of the television station had not come into question, there would have been no opportunity for Shurberg to pursue. See *Shurberg*, 876 F.2d at 951 (Wald, C.J., dissenting). The potential availability of the broadcast station license was merely fortuitous and did not carry with it the kind of settled expectations protected by the Court in *Wygant*. A potential applicant for a license, such as Shurberg, is analogous to a job applicant, and the impact the distress sale policy places on Shurberg is permissible under the *Wygant* analysis.

#### CONCLUSION

For the reasons set forth above, the National Association of Black Owned Broadcasters, Inc. requests that the Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit and reinstate the Federal Communications Commission's grant of the assignment of license of WHCT(TV), Hartford, Connecticut, to Astroline Communications Company Limited Partnership.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

**ASTROLINE COMMUNICATIONS COMPANY  
LIMITED PARTNERSHIP,**  
*Petitioner,*

v.

**SHURBERG BROADCASTING OF HARTFORD, INC.,**  
*Respondent.*

**On Writ of Certiorari to the  
United States Court of Appeals for the  
District of Columbia Circuit**

**BRIEF OF CONGRESSIONAL BLACK CAUCUS, THE  
NATIONAL ASSOCIATION FOR THE ADVANCEMENT  
OF COLORED PEOPLE, NATIONAL BLACK MEDIA  
COALITION, AND THE LEAGUE OF UNITED LATIN  
AMERICAN CITIZENS AS AMICUS CURIAE IN SUPPORT  
OF PETITIONERS**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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No. 89-322

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ASTROLINE COMMUNICATIONS COMPANY,  
*Petitioner,*

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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BRIEF OF CONGRESSIONAL BLACK CAUCUS, THE  
NATIONAL ASSOCIATION FOR THE ADVANCEMENT  
OF COLORED PEOPLE, NATIONAL BLACK MEDIA  
COALITION, AND THE LEAGUE OF UNITED LATIN  
AMERICAN CITIZENS AS *AMICI CURIAE* IN SUPPORT  
OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Congressional Black Caucus ("CBC") was formed in 1970 when thirteen Black members of the U.S. House of Representatives joined together to strengthen their efforts to address the legislative concerns of Black and minority citizens.

The vision and goals of the original thirteen members, "to promote the public welfare through legislation designed to meet the needs of millions of neglected citizens," has been reaffirmed through the legislative and political successes of the Caucus. The CBC is involved in legislative initiatives ranging from full employment, welfare reform, South African apartheid and international human rights, to minority business development and expanded educational opportunity. The CBC was also the originator and the petitioner for the rulemaking leading to the adoption of the distress sale policy.<sup>1</sup>

The National Association for the Advancement of Colored People ("NAACP") is the oldest and largest civil rights organization in the United States. It is a non-profit corporation with over 500,000 members and 2,300 branches and youth units throughout the country. The basic aims of the organization are to advance minority participation in all aspects of society and to destroy all limitations or barriers based upon race or color. The NAACP has long been involved in strengthening the machinery for combatting discrimination within the media and in maintaining the policies aimed at remedying societal discrimination and promoting diversity of broadcast programming.

The National Black Media Coalition ("NBMC") is the principal civil rights organization focusing on minority employment and ownership in the broadcast media. Since its founding in 1973, NBMC has participated in dozens of adjudicatory and rulemaking proceedings to vindicate and expand the FCC's minority ownership policies.

The League of United Latin American Citizens ("LULAC") is a sixty-year old national membership organization concerned with advancing the civil rights and promoting the educational, economic and social well being of Hispanic Americans in the United States. LULAC has actively promoted minority employment and minority ownership policies in the broadcast media before the FCC and the courts.

<sup>1</sup> Statement of Policy on Minority Ownership in Broadcasting, 68 F.C.C.2d 979, 983 (1978).

The District of Columbia Circuit invalidated the distress sale policy prescribed by Congress and implemented by the Federal Communications Commission ("FCC"). The policy in question is designed not only to remedy minority underrepresentation in broadcasting, stemming from past discrimination, but also to promote diversity of broadcast programming. Each of the *amici* is vitally interested in the policies implicated by the D.C. Circuit's decision in this case.<sup>2</sup>

### SUMMARY OF ARGUMENT

Congress has determined that the distress sale policy is necessary to promote diversity of programming, an interest which is rooted in the First Amendment, and to avoid the perpetuation of the effects of prior state-sanctioned discrimination, in accordance with its broad powers to enforce the Fourteenth Amendment. H.R. Rep. No. 765, 97 Cong., 2d Sees. 40, 43 (1982). This Court has recognized that Congress, unlike any other governmental body, has the authority to act on the basis of such findings to remedy past societal discrimination. *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Accordingly, in determining the constitutionality of the distress sale policy, Congress's choices as to both means and ends are entitled to deference.

The Court has found that policies which distinguish among individuals on the basis of race must survive strict scrutiny in order to be constitutional. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 720-723 (1989). In particular, the policy must further a compelling governmental interest and it must be narrowly tailored to achieve that goal. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986). The distress sale policy fulfills both requirements and is, therefore, constitutional.

<sup>2</sup> Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of the Court.

The distress sale policy first serves the compelling governmental interest in promoting diversity among broadcast licensees, which derives from First Amendment values. Congress and the Federal Communications ("FCC") have found that the public is best served by the "widest possible dissemination of information from diverse and antagonistic sources." The FCC, empowered by the Communications Act of 1934 to promote the public interest, has determined that the diversity of ownership is one means by which the listening and viewing public will be assured of receiving a broad spectrum of perspectives. As a result, the FCC's policy to encourage diversity is an integral part of the agency's regulatory framework. The distress sale policy is just one component of the FCC's overall objective to diversify broadcast licensees.

The distress sale policy also serves the compelling governmental goal of avoiding the perpetuation of prior state-sanctioned discrimination. Congress found that the paucity of minority broadcasters was directly related to legalized discrimination, which precluded their participation in the FCC licensing process. H.R. Rep. 765, 97th Cong., 2d Sess. 43 (1982). By the time this Court and the Congress had dismantled the legal barriers to minority presence in economic and political life, the broadcast industry had matured to such an extent that most television and radio frequencies, of which there is a limited number, had already been allocated. Furthermore, FCC regulations had provided broadcasters an expectancy in obtaining renewal of their licenses. As a result, the avenues for minority involvement in the industry were severely limited. The distress sale policy is thus one carefully circumscribed remedy designed to diminish the effects of a legacy of discrimination.

The distress sale policy is a narrowly tailored means to accomplish the goals of Congress and the FCC. It is utilized under very particular circumstances and specifically serves the vital governmental objectives described above. The Commission has the discretion to invoke the policy, which only occurs when a licensee decides to sell his station at distress prices, rather than go through a hearing. *Shurberg Broadcasting of Hartford, Inc. v.*

*FCC*, 876 F.2d 902, 950 (D.C. Cir. 1989) (Wald, C.J., dissenting). Thus, the policy is flexible unlike a rigid quota. Because the policy lessens the financial impediments to broadcast ownership, it is rationally related to the governmental objectives that justify its existence. In addition, the policy does not unduly burden nonminorities. A distress sale does not infringe upon a broadcaster's legitimate expectation to receive a license because "no one has a First Amendment right to (obtain one.)" *Red Lion Broadcasting v. FCC*, 396 U.S. 367, 389 (1969). In addition, the distress sale has resulted in the transfer of only thirty-eight stations to minority-controlled businesses in twelve years, or 0.28% of all broadcast stations in the nation. Accordingly, the governmental interests served by the distress sale policy and the limited nature in which it accomplishes those goals outweigh the minimal harm suffered by respondent.

## ARGUMENT

### CONGRESS MAY PRESCRIBE THE CONSIDERATION OF RACE IN THE TRANSFER OF BROADCAST LICENSES TO PROMOTE DIVERSITY OF BROADCAST LICENSEES AND TO AVOID THE PERPETUATION OF THE EFFECTS OF PRIOR STATE-SANCTIONED DISCRIMINATION

On three separate occasions, Congress has directed the FCC to maintain the distress sale policy originally adopted by the FCC in 1978.<sup>3</sup> The continuing resolution appropriating funds for the federal government for fiscal year 1988 provided (Pub. L. No. 100-202, 101 Stat. 1329 (1987):

"That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue reexamination of, the policies of the Federal

<sup>3</sup> Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Pub. L. 101-10162, 103 Stat. 1020-1021 (1990).

Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities . . . and Mid-Florida Television Corp., . . ., which were effective prior to September 12, 1986, other than to close MM Docket No. 86-464 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry. . . ."

Congress reiterated this proscription for fiscal year 1989 and 1990. *See Shurberg*, 876 F.2d at 938 n.10 (quoting H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40, 43 (1982)).<sup>4</sup> "Whatever its status at prior stages of this litigation, the distress sale program is today a deliberately chosen congressional policy, embodied in legislation passed by the House and Senate and signed by the President." *Id.*

<sup>4</sup> In 1982, Congress amended the Communications Act to authorize the FCC to employ lotteries in lieu of comparative license hearings, and specifically provided for special media ownership and minority ownership preferences. Specifically citing the FCC's 1978 Policy Statement, in which the FCC announced the minority distress sale policy, the Conference Committee concluded that:

"[An] important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities - groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so."

H.R. Conf. Rep. No. 765, 97th Cong. 2d Sess. 43 (1982).

**A. When Congress Acts to Assure Full Minority Participation in the Mainstream of American Economic and Political Life, this Court May Invalidate its Action Only When it is Clear that the Means Chosen are Unrelated to the Stated Ends**

A majority of this Court has determined that "strict scrutiny" is the appropriate standard of review whenever government action distinguishes among people on the basis of race.<sup>5</sup> The racial classification "must be justified by a compelling governmental interest," *Wygant v. Jackson*, 476 U.S. at 274 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)), and "the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. at 480.)

The Court has recognized, however, that Section 5 of the Fourteenth Amendment "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Fullilove*, 448 U.S. at 476 (Burger, C.J.) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)); *see Croson*, 109 S. Ct. at 719 (O'Connor, J.). For that reason, when Congress acts to assure full minority participation in the mainstream of American economic and political life, it is entitled to some deference with respect to its choices as to both means and ends. *See Fullilove*, 448 U.S. at 472, 483-4; *Id.* at 502-3, 510 (Powell, J.); *see also Croson*, 109 S. Ct. at 719 (O'Connor, J.). "[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce the equal protection guarantees." *Fullilove*, 448 U.S. at 483 (Burger, C.J.).

<sup>5</sup> *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 720-723 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273-4 (1986) (Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (Burger, C.J.).

So long as the basis for Congressional action in this area is discernible, Congress need not compile an evidentiary record of the sort that might be required for judicial action. *Fullilove*, 448 U.S. at 463-67 (Burger, C.J.); *Id.* 448 U.S. at 503 (Powell, J.). Nor may this Court substitute its judgment for that of Congress as to the adequacy of the record. The Court "is bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power . . . 'to enforce by appropriate legislation, the equal protection guarantees of the Fourteenth Amendment.'" *Fullilove*, 448 U.S. at 472. Absent a substantial basis for concluding that the legislative judgment that affirmative steps to redress prior discrimination and assure the full participation of minorities in all aspects of American life was pre-textual, Congress's collective judgment should be sustained. The judgment of Congress should be sustained even if a majority of this Court might reach a different judgment as to the need for action on the basis of the available evidence.

When Congress directed the FCC to maintain the distress sale policy to assure increased diversity of expression in broadcasting through minority ownership of broadcasting facilities, Congress exercised both its broad power over interstate commerce under Article I, Section 8, and its equally broad power to advance racial equality under Section 5 of the Fourteenth Amendment. The objective of increasing racial diversity among broadcast licensees serves to implement both the First Amendment value of the "widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and the Fourteenth Amendment value of full participation by racial minorities, as licensees, speakers, and listener/viewers, in this very important aspect of American economic and political life. Congress's judgment as to both the need for affirmative efforts to increase minority participation in this area and the reasonableness of the distress sale policy as the means of achieving this important goal are amply supported and should be sustained.

## B. The Distress Sale Policy Furthers the Compelling Government Objective of Diverse Broadcast Licensees

This Court has recognized the important First Amendment values at the core of the FCC's policies encouraging diversity of broadcast licensees. See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978): "[T]he 'public interest' standard necessarily invites reference to First Amendment principles, and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources' . . . ." (citations omitted).

Congress has both the power and responsibility to ensure that there is diversity in broadcast programming. Precisely because broadcast licensing involves the allocation of scarce frequencies, the government's interest in assuring diversity is directly related to the goals of the First Amendment:

"the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech . . . and their collective right to have the [electronic media] function consistent with the ends and purposes of the First Amendment. It is the rights of the viewers and listeners, not the right of the broadcasters, which is paramount."

*Red Lion Broadcasting Co. v. FCC*, 396 U.S. at 390.<sup>6</sup> Thus, the distress sale policy is just one component of the FCC's much broader policy encouraging diversity to promote core First Amendment values. Moreover, the fact that the distress sale policy is intertwined with the FCC's regulatory framework militates against invalidating the policy. See *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989)(upholding *Runyon v. McCrary*, 427 U.S. 160 (1976)). Less than one year after the distress sale policy was enacted, the FCC decided to dismantle its half-century-old regime of content-based broadcast regulation.<sup>7</sup> In deregulating radio (and later television), the FCC almost entirely abolished program content regulation, relying explicitly upon distress sales and other minority policies as its preferred means of fostering diversification of ownership and programming.<sup>8</sup> Thereafter, the FCC continued to introduce major

<sup>6</sup> Several FCC rules regarding ownership of stations were enacted for purposes of providing the public with diverse programming. See e.g., Chain Broadcasting Rules, 3 Fed. Reg. 747 (1938), in which the Commission set forth the areas of concern regarding network ownership of radio stations. Even at that time, the FCC had concluded that ownership had an effect upon the programming received by viewers. The result of that assumption was a rule limiting network ownership of radio stations. See also 47 C.F.R. § 73.3555, the FCC's multiple ownership rule, which prohibits licensees from owning two radio or television stations whose service areas overlap; and 47 C.F.R. § 73.658(f), prohibiting network ownership of television stations in areas "where the existing television broadcast stations are so few or of such unequal desirability . . . that competition would be substantially restrained by such licensing."

These rules were enacted to increase competition among licensees by prohibiting a monopoly of ownership by any one group, and to thereby increase the variety of programs available to the public. See *Hudson Valley Broadcasting*, 13 Rad. Reg. (P&F) 49, 58-59 (1956) ("The plain intent of . . . Rule [73.658(f)] is to prevent ownership or substantial measure of control . . . as to restrain, through limitation of competition, the receipt by the public of a variety of . . . programs.") The nexus between diversity of ownership and diversity of programming has thus been an underlying assumption of the FCC diversity policy since its inception.

<sup>7</sup> In *Deregulation of Radio*, 73 F.C.C.2d 457, 482 (1979)(notice of proposed rulemaking), the FCC stated that "[e]fforts to promote minority ownership and EEO are underway and promise to bring about a more demographically representative radio industry."

<sup>8</sup> The FCC explained as follows:

new deregulatory initiatives, relying fully upon the assumption that its distress sale policy would be available to protect minorities in the media marketplace.<sup>9</sup> The D.C. Circuit has approved this policy decision.<sup>10</sup>

Thus, while the telecommunications revolution has burgeoned, the FCC has relied extensively on distress sales as a narrowly tailored means of diversifying broadcast ownership. Accordingly, the evisceration of the minority ownership policies will undermine the principal premise supporting the theory of broadcast deregulation. The FCC will thus be left with two

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[I]t may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public.

*Deregulation of Radio*, 84 F.C.C.2d 968, 1036, recon. granted in part, 87 F.C.C.2d 797 (1981), *aff'd in pertinent part sub nom., Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). The FCC explicitly concluded that the minority ownership policies and EEO rules, rather than direct regulation of broadcast content, were preferable means to achieve diversification. *Id.* at 977. Indeed, under radio deregulation, if one station in a market is serving minorities, no other station in the market is required to do so, *id.* at 991, which is a dramatic departure from the regulatory structure that had been in place for at least a generation. Compare *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960) and FCC, *Public Service Responsibility of Broadcast Licensees* 15 (March 7, 1946)(the "Blue Book")(each station is expected to serve minority groups).

<sup>9</sup> See *Amendment of section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations)*, 75 F.C.C.2d 587, 599 (1979)(separate statement of Chairman Ferris), *aff'd sub nom., NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982); *Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order*, 101 F.C.C.2d 638, recon. denied, 59 Rad. Reg.2d (P&F) 1221 (1985), *aff'd sub nom., National Black Media Coalition v. FCC*, 882 F.2d 277 (2d Cir. 1987); *Deletion of AM Acceptance Criteria in section 73.37(e) of the Commission's Rules*, 102 F.C.C.2d 548, 558 (1985), recon. denied, 4 F.C.C. Rcd 5218 (1989); *Nighttime Operations on Canadian, Mexican and Bahamian Clear Channels*, 3 F.C.C. Rcd 3597 (1988), recon. denied, 4 F.C.C. Rcd 4711 (1989).

<sup>10</sup> *NAACP v. FCC*, 682 F.2d at 1004 (holding that the FCC "ha[d] not improperly exercised its discretion by relying on [its minority ownership, employment and programming policies] rather than the Top-Fifty Policy, to advance minority goals.")

choices: to return to program content regulation, a direction which it has almost completely repudiated;<sup>11</sup> or to abstain from practically all regulation. Indeed, as the Second Circuit has noted, the elimination of such policies "might have an effect on the balancing interests undertaken by the FCC." *National Black Media Coalition v. FCC*, 822 F.2d 277, 284 (2d Cir. 1987).

Racial diversity in broadcasting is clearly related to "securing the public's First Amendment interests in receiving a balanced presentation" of views on diverse matters of public concern. *FCC v. League of Women Voters*, 468 U.S. 364, 385 (1984). In particular, racial diversity among the holders of broadcast licenses ensures that the viewpoints of racial minorities, in addition to the perspective on information and ideas that comes from the experience of being a minority person in America, are conveyed to the public at large, non-minority as well as minority.<sup>12</sup> Congress has acknowledged the public benefit resulting from increased diversity among licensees:

The Congress has found . . . that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

S.Rep. 182, 100th Cong., 1st. Sess. 76 (1989). As Judge Wald observed: "The distress sale policy rests on the assumption that viewers and listeners of every race will benefit from access to a broader range of broadcast fare, not that consumers will

<sup>11</sup> See *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C. Rcd 5043 (1987), *aff'd sub nom.*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (1989), *cert. denied*, 110 S. Ct. 717 (1990).

<sup>12</sup> See *NAACP v. Federal Power Commission*, 425 U.S. 662, 670 n.7 (1976), in which this Court upheld FCC regulations prohibiting discriminatory employment practices, noting that the rules were "necessary to enable the FCC to satisfy its obligations under the Communications Act of 1934, to ensure that its licensees' programming reflects the tastes and viewpoints of minority groups." The Commissioner explicitly relied upon that reasoning in adopting the distress sale policy. *Statement of Policy on Minority Ownership*, 68 F.C.C.2d at 980.

inevitably gravitate towards programming disseminated by licensees of their own race." *Shurberg*, 876 F. 2d at 942 (Wald, C.J., dissenting ).<sup>13</sup>

In adopting the distress sale policy in 1978, the FCC explicitly recognized the importance of minority broadcast licensees to the values underlying the First Amendment:

"[W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment."

Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d at 982.<sup>14</sup> Congress also has recognized the importance of increased minority broadcast licensees to core First Amendment values:

"The underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of programming content. This diversity principle is grounded in the First Amendment . . . *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Thus, in finding that the 'public interest, convenience and necessity' would be served by granting a given mass communications media license, 'the

<sup>13</sup> See also *supra* note 4.

<sup>14</sup> See also *Waters Broadcasting Co. Inc.*, 91 F.C.C.2d 1260, 1265 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985) (minority ownership is "likely to serve the important function of providing a different insight to the general public about minority problems and minority views[.]").

Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it."

H.R. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).<sup>15</sup>

Diversity, as it embraces the values embodied in the First Amendment, is the ideal in this society.<sup>16</sup> Cf. *Univ. of Cal.*

<sup>15</sup> Indeed, because of the growing complexity of society, knowledge of other groups is increasingly based on perceived personal characteristics. Abramson, Misrucky and Hornung, *Stratification and Mobility* 9 (1976). When personal intergroup contact is absent or limited, media portrayals of members of other groups must instead serve the function of definition or confirmation of perceptions of other groups. Thus, when and if it addresses racial issues, media can be a powerful force reducing negative stereotyping. Scherer, *Stereotype Change Following Exposure to Counter-Stereotyping Media Heroes*, 15 *Journal of Broadcasting* 51 (1970). The power of the media to determine how group members know members of other groups is suggested by a classic study demonstrating that one quarter of young White viewers reported that "most of the things I know" about Blacks come from television viewing." Atkin, Greenberg and McDermott, *Television and Race Role Socialization*, 60 *Journalism Quarterly* 407, 414 (1983). Unfortunately, that information has frequently been negative, stereotypical, incomplete or inaccurate. See, e.g., Roberts, *The Presentation of Blacks in Television Network Newscasts*, 52 *Journalism Quarterly* 50 (1975); Fife, *Black Images in American TV: The First Two Decades*, 6 *Black Scholar* 7 (November, 1974); Roberts, *The Portrayal of Blacks on Network Television*, 15 *Journal of Broadcasting* 45 (1970).

<sup>16</sup> The FCC has recognized that there can never be too much diversification in the mass media:

[a] proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be that the 51st licensee . . . would become the communication channel for a solution to a severe local social crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated.

*Regents v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J.). Accordingly, the validity of the distress sale policies does not depend at all on statistical or other proof that the programming decisions of Black or other minority licensees will be controlled

*In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 F.C.C.2d 306, 311 (1970).

by their personal tastes, rather than their markets.<sup>17</sup> Further, of course, the views of minority licensees may be identical to those of white male licensees on many issues of public policy. On other issues, however, the experience of being a minority in America

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<sup>17</sup> Several studies do suggest, however, that the race of a broadcast licensee does have an effect upon programming. See, e.g., The Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (1988). Data collected by the FCC from nearly 9,000 of its 12,101 television and radio stations, indicated that there is a strong correlation between minority ownership and programming targeted to minority audiences. While only 20% of stations without any Black ownership responded that they provide programming directed to Black audiences; 65% of stations with Black ownership said that they did so. Only 10% of stations without Hispanic ownership responded that they provided Hispanic programming, while 59% of stations with Hispanic owners did so.

This study was consistent with the results of four other studies addressing the same question. Johnson, *Media Images of Boston's Black Community*, (Jan. 28, 1987) (available at the William Monroe Trotter Institute, University of Massachusetts at Boston) (unpublished manuscript), (examining treatment of over 3000 local news stories by white and Black-owned media and finding statistically significant differences in racial identifications and positive or negative treatment of certain types of stories); Fife, *The Impact of Minority Ownership on Broadcast News Content: A Multi-Market Study*, (1986) (available at the Department of Telecommunication, Michigan State University) (unpublished study) (concluding that minority owned television stations had statistically significantly higher representation of Blacks on newscasts than did comparable non-minority owned stations); Jeter, "A Comparative Analysis of the Programming Practices of Black-Owned, Black-Oriented Radio Stations and White-Owned, Black-Oriented Radio Stations," Ph.D. Dissertation, University of Wisconsin, 1981 (finding that Black-owned radio stations had statistically significantly more diverse playlists, featuring jazz, rock, blues, gospel formats, e.g., than did white-owned, Black-oriented stations); Honig, "Relationships among EEO, Program Service, and Minority Ownership in Broadcast Regulation," printed in *Proceedings of the Tenth Annual Telecommunications Policy Research Conference* 85, 87-88 (1983) (finding, for example, that in Black oriented stations, 72% of management employees at Black owned stations were Black but 38% of management employees at White owned stations were Black).

Of course, it would be stereotyping to suggest that all minorities *should* only target their programming towards their respective groups, or that all minorities would even desire to do so. However, the evidence clearly shows that minority broadcasters *do* make special efforts to serve those members of their own racial group.

may produce significantly different perspectives.<sup>18</sup> Diversity assures that on those occasions when there are differences of perspective, the voices of minorities will be heard distinctly, and

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<sup>18</sup> One aspect of this qualitative difference in perspective was noted by the National Advisory Commission on Civil Disorders in 1968:

"The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slightings and indignities are part of the Negro's daily life, and many of them come from what he calls the 'white press' - a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform the whole of our society."

National Advisory Commission on Civil Disorders, *1968 Report* 203 (1968).

As Professor Harvey Levin explains, "minority tastes become a public interest to be protected because there are so few stations catering to them, and because there is no widely used pay mechanism to register the viewer's intensity of desire and consumer surplus." Levin, *Fact and Fancy in Broadcast Regulation*, 47-48 (1980); see also Glasser, *Competition and Diversity among Radio Formats: Legal and Structural Issues*, 28 *Journal of Broadcasting*, 127, 130 (1984); Owen, *Economics and Freedom of Expression* 114 (1975); Noll, Peck and McGowan, *Economic Aspects of Television Regulation* 49 (1974).

not as edited or screened by white males,<sup>19</sup> to the benefit of all participants in the debate.<sup>20</sup>

### C. The Distress Sale Policy Furthers the Compelling Objective of Avoiding the Perpetuation of Prior Discrimination

Professor Bickel is certainly right that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."<sup>21</sup> The fact remains, however, that the distribution of radio and television broadcast licenses today is

<sup>19</sup> This concept translates into the journalistic environment as "agenda setting," a role played by the mass media and other social forces to build public consensus on the relative priorities in importance of various public issues. See McCombs and Shaw, *The Agenda-Setting Function of Mass Media*, 36 Public Opinion Quarterly 176 (1972). The Commission has long recognized the significance of agenda setting in the context of diversification of information. See, e.g., *Deregulation of Television*, 98 F.C.C.2d 1076, 1094 n. 61 (1984) ("we believe our action today will serve to increase the number of issues placed on the public's agenda, thereby advancing the fundamental goal of diversity.") The "agenda priorities" for public issues are quite different as between minorities and non-minorities. See, e.g., Gallup Report on Political, Social and Economic Trends No. 185 at 29 (February 1981) (59% of Blacks and 17% of Whites "favor busing children to achieve a better racial balance in the schools"); Gallup Report Nos. 256-257 (January/February, 1987) at 22 (When asked "how well do you think Blacks are treated in this community -- the same as Whites are, not very well or badly?", 54% of Blacks and 27% of Whites responded "not very well" or "badly.")

<sup>20</sup> Communications scholars almost universally agree that minority media professionals do, in fact, bring greater awareness and sensitivity to minority issues, problems and concerns to their jobs. See, J. Fred MacDonald, *Blacks and White TV* (1983); B. Rubin, *Small Voices and Great Trumpets* (1983). Indeed, the Black press, which is 100% Black-owned, has always viewed addressing Black community needs as its major function and reason for existing. See, e.g., Wolseley, *The Black Press U.S.A.* 17-21 (1971); Collier, *The Black Press in America: A Powerful Force Defined*, *The American Press* 14 (1945); Myrdal, *An American Dilemma* 911 (1944); Detweiler, *The Negro Press in the United States* (1922).

<sup>21</sup> *Croson*, 109 S. Ct. at 735 (Scalia, J.) (quoting A. Bickel, *The Morality of Consent* 133 (1975)).

the product of a system of state-sanctioned preferences favoring white males.<sup>22</sup>

The evidence that state-sanctioned racial discrimination prior to and after *Brown vs. Board of Education*, 347 U.S. 483 (1954) (*Brown I*) seriously impaired the ability of Black Americans to participate fully in the economic and political mainstream of American life has been chronicled in this Court's opinions and elsewhere.<sup>23</sup> There can be no serious dispute that state-sanctioned racial discrimination affected the ability of minorities to compete for broadcast licenses awarded by the FCC both before and after *Brown I*.<sup>24</sup> Yet, the FCC policies for awarding broadcast licenses ignored the effects of prior discrimination on the ability of minorities to compete for licenses until 1978. In the meantime, however, most licenses had been awarded to white males. Thus, as of the end of June 1973, licenses for 765 (66.6%) of the 1,149 commercial television stations that existed in mid-1989 had already been awarded. As for VHF stations, 521 (91.4%) of the 570 authorized today had been licensed by the middle of 1973. Of the 10,209 AM and FM radio stations authorized by the FCC as of the middle of 1989, 6,994 (68.5%) had been handed out by the middle of 1973,

<sup>22</sup> For the first 150 years of this nation's history, this Court explicitly approved discrimination against Black Americans and other minorities, and, more important, in favor of white males. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). This Court's recognition in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), that discrimination against Black Americans in public education was inconsistent with the promise of equal protection did not eliminate racial discrimination or racism, as this Court's subsequent decisions attest, e.g., *United States v. Paradise*, 480 U.S. 149 (1987); *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>23</sup> See, e.g., *Fullilove* 448 U.S. at 463-467 (Burger, C.J.); *Bakke*, 438 U.S. 265, 387-96 (Marshall, J., concurring in part).

<sup>24</sup> See H.R. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982); see also Testimony of David Honig before the FCC *en banc* AM Improvement Hearing 15 (Nov. 16, 1989) (first minority broadcast license granted in 1956; first after a comparative hearing 1975).

some 4,434 (85%) of the AM stations had likewise been awarded at that time.<sup>25</sup>

Notwithstanding the FCC's efforts to increase the number of minority broadcast licensees since 1978, today just over 2% of all radio and television station licenses are held by minorities.<sup>26</sup>

Congress specifically found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy. . . ." H.R. Rep. 765, 97th Cong., 2d Sess. 43 (1982). The FCC was at least a "passive participant." *Croson*, 109 S. Ct. at 720 (O'Connor, J.). Its failure to recognize the effects of state-sanctioned racial discrimination in awarding broadcast licenses prior to 1978 resulted in the virtual exclusion of minority broadcast licensees.

Broadcast employment is the most direct route to ownership of a broadcast license. Yet for years the FCC gave broadcasters free rein to discriminate in employment, failing, until 1989, to find a single broadcaster guilty of employment discrimination.<sup>27</sup> The

<sup>25</sup> Testimony of John Payton before the United States Senate Committee on Commerce, Science and Transportation, Communications Subcommittee 21 n.31 (Sept. 15, 1989) (citations omitted).

<sup>26</sup> Testimony of Payton, *supra* note 25, at 2; see H.R. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982) (as of Dec. 1981, 164 of 8,748 commercial broadcast licenses held by minorities; 32 of 1,386 noncommercial stations licenses held by minorities).

<sup>27</sup> This Court has held that where judicial findings of racial discrimination in employment are extensive, judicial notice is appropriate. See *United Steel Workers v. Weber*, 443 U.S. 193, (1979). The history of minority exclusion from broadcast employment has been thoroughly documented, such that judicial notice in this case is warranted. See U.S. Commission on Civil Rights, *Window Dressing on the Set* (1977); *National Advisory Commission on Civil Disorders*, *supra* note 18, at 383-84 (finding that in journalism in 1968, fewer than 1% of management employees were Black, most of whom worked in Black-owned organizations). Nonetheless, despite hundreds of EEO complaints, on only one occasion has the FCC found that a licensee engaged in discrimination. *Catocin Broadcasting of New York*, 4 F.C.C. Rcd 2553, 2558, *recon. denied*, 4 F.C.C. Rcd 6312 (1989), *appealed*, D.C. Cir. No. 89-1552 (filed September 14, 1989). The D.C. Circuit has repeatedly been critical of the FCC's failure to enforce its EEO Rule. *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *National Black Media Coalition v. FCC*,

FCC awarded broadcast license renewals to applicants with records of flagrant discrimination in programming.<sup>28</sup> It held that persons who conduct discriminatory business practices qualify for licenses,<sup>29</sup> even when those practices occurred in other media.<sup>30</sup> At times, it applied its licensing policies unevenly to the

775 F.2d 342 (D.C. Cir. 1985); *Bilingual Bicultural Coalition on the Mass Media v. FCC*, 595 F.2d 621 (D.C. Cir. 1978); *Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59 (D.C. Cir. 1977). Indeed, minority representation in professional employment in broadcasting increased only 1.1 percentage point from 1981 to 1988, from 13.9% to 15.0%. See FCC, *Broadcast EEO Trend Report* (1981); FCC, *Broadcast EEO Trend Report* (1988).

<sup>28</sup> In many instances, the FCC inaction facilitated discrimination practiced by its licensees. See, e.g. *The Columbus Broadcasting Company, Inc.*, 40 F.C.C. 641 (1965) (licensee helped incite the riot which took place at the University of Mississippi when James Meredith attempted to enroll, but FCC merely admonished the station.); *Broward County Broadcasting*, 1 Rad. Reg. 2d (P&F) 294, 296 (1963) (FCC allows threat of legal action by white citizens to prevent Florida station from addressing small portion of programming to Black community.) Compare *Lamar Life Broadcasting Co.*, 38 F.C.C. 1143 (1965), *rev'd*, *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) and *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) (FCC refused to hold hearing on Jackson, Mississippi TV licensee which operated fully segregated program schedule. After being ordered to do so, FCC held biased, one-sided hearing. The D.C. Circuit subsequently ordered FCC to deny the license renewal request).

<sup>29</sup> See *Chapman Radio and Television Co.*, 24 F.C.C.2d 282 (1970) (applicant, part owner of segregated cemetery, participated in decision to maintain segregation). See also *Chapman Radio and Television Co.*, 21 Rad. Reg.2d (P&F) 885, 895, 897 (Examiner 1971) (subsequent decision in which hearing examiner found that the segregation was acceptable "in the milieu of Alabama, 1971." Examiner also condoned the applicant's effort to conceal his involvement in the cemetery segregation, characterizing allegations against him as "irresponsible and only half true racism charges.")

<sup>30</sup> *Southland Television Co.*, 10 Rad. Reg. (P&F) 750, *recon. denied*, 20 F.C.C. 1959 (1955) (FCC found operator of segregated movie theaters qualified to hold license. Further awarded full faith and credit to Louisiana's segregation laws, one year after *Brown I.*)

detriment of minorities.<sup>31</sup> Moreover, the FCC routinely provided broadcast licenses to colleges and universities which were totally segregated, effectively endorsing and facilitating segregated broadcast education.<sup>32</sup>

Without affirmative efforts specifically directed toward increasing the number of minority licensees, white males will continue to control virtually all radio and television stations in this country for the foreseeable future. The FCC adopted the distress sale policy in 1978 only after it had become clear that its general policies encouraging diversity had failed to achieve significant minority participation. Further, the Commission found that despite its policies promoting equal employment opportunity and requiring licensees to ascertain community interests and needs, "the views of racial minorities continue[d] to be inadequately represented in the broadcast media." 68 F.C.C. 2d at 982.<sup>33</sup>

The distress sale policy thus recognizes that past state-sanctioned racial discrimination has all but excluded minority broadcast licensees. Because most licenses are renewed, the initial awards affect the distribution of licenses long into the

<sup>31</sup> From 1965 until 1981, the FCC applied its *Ultravision* rule to new applicants. In 1981 the Commission revoked the rule, which imposed stringent financing requirements, finding that it had inhibited minorities from obtaining licenses. See *Ultravision Broadcasting Company*, 1 F.C.C.2d 544 (1965), *repealed*, *New Financial Qualifications Standards for Broadcast Assignment and Transfer Applicants*, 87 F.C.C.2d 200, 201 (1981). In addition, the Commission's frequency allocations have not always been free of racial taint. See *1360 Broadcasting Co.*, 36 F.C.C. 1478, (dissenting Statement of Joseph Nelson) (Rev. Bd. 1964) (criticizing majority's refusal to waive nighttime coverage rule for AM operator wishing to bring such coverage to Baltimore Black community when comparable requests had been routinely approved in predominately white areas).

<sup>32</sup> Some of the many examples include KASU-FM, Jonesboro, Arkansas, licensed to Arkansas State University in 1957; WBKY-FM, Lexington, Kentucky, licensed to the University of Kentucky in 1941; WUNC-FM, licensed to the University of North Carolina in 1952; KUHF-FM, Houston, Texas, licensed to the University of Houston in 1950; KUT-FM, licensed to the University of Texas in 1958; WTJU-FM, licensed to the University in 1957.

<sup>33</sup> Citing *FCC Minority Ownership Task Force, Minority Ownership Report* 1978; U.S. Commission on Civil Rights, *Window Dressing on the Set* (1977).

future.<sup>34</sup> Only the most well-financed Americans can even consider entering the bidding for a radio or television station in the major markets today, and very few minorities are in a position to do so. The Commission<sup>35</sup> and the Congress<sup>36</sup> have each recognized that past discrimination has inhibited minority entry into ownership. Such findings are entitled to considerable

<sup>34</sup> Most of the most valuable licenses, e.g., those for VHF-TV frequencies, have long since been parcelled out, creating enormous scarcity rents. See Owen, Beebe and Manning, *Television Economics* 114 (1974). See also, *Central Florida Enterprises v. FCC*, 683 F.2d 503, 506-510 (D.C. Cir. 1982) (Licensee has an expectancy in renewal based upon past performance. Court noted that, as of that time, no "incumbent television station licensee ha[d] [ever] been denied renewal in a comparative hearing.")

In addition, section 310(d) of the Communications Act, 47 U.S.C. § 310(d), prevents the Commission from considering any assignee or transferee other than the one proposed by the seller. Moreover, the market for broadcasting sales is highly specialized and discreet, even more so than residential real estate since there is no "multiple list" service or industry-wide code of nondiscrimination. The day after it adopted the distress sale policy, the Commission declined to make broadcast sales public to increase minority ownership -- preferring instead to rely on policies such as the one at issue here. *Public Notice of Intent to Sell Broadcast Station*, 43 Rad. Reg.2d (P&F) 1 (1978). There is only one minority broadcast station broker in the country. Consequently, minorities frequently fail to receive notice of stations listed for sale. As a result, it has been difficult for minorities to make out a successful case of race discrimination in the sale of broadcasting stations. See, e.g., *Evening Star Ass'n.*, 67 F.C.C.2d 318, 325-330, *recon. denied*, 68 F.C.C.2d 158 (1978).

<sup>35</sup> *Statement of Policy of Minority Ownership*, 68 F.C.C.2d at 981.

<sup>36</sup> The 1982 House Conference Committee Report affirming Congress' support for the distress sale policy stated:

[T]he effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well.

H.R. Conf. Rep. No. 765, *supra* note 4, at 43. Significantly, Congress explicitly relied on an FCC report, "FCC Minority Ownership Taskforce: Report on Minority Ownership in Broadcasting" (May 17, 1978) in reaching this conclusion. H.R. Conf. Rep. No. 765, *supra* note 4, at 44. This parallels Congress' use of a U.S. Civil Rights Commission Report as a major underpinning in adopting the MBE program approved in *Fullilove*, 448 U.S. at 466-67.

weight. *Fullilove*, 448 U.S. at 472; *Croson*, 109 S. Ct. at 719 (O'Connor, J.). While neither the Commission nor the Congress expressly relied on the Commission's own contributions to that history of discrimination, they both may be presumed to have been aware of the above-cited reported decisions of the agency and of its institutional history.

Given the FCC's role in the history of minority exclusion from broadcast licenses, the distress sale policy is even more reasonable. As a means to remedy prior exclusion, Congress's choice of distress sales should be sustained in these circumstances. The equal protection component of the Fifth Amendment does not require Congress or the FCC to tolerate or maintain a system that assures the preferred place of white males in the nation's economic or political institutions indefinitely.

#### D. The Distress Sale Policy is Narrowly Tailored to Achieve Its Objectives

The objectives of the distress sale policy cannot be achieved through the use of race neutral criteria. It was only after the failure of the general diversity policies that the FCC adopted the distress sale policy in 1978. Because of the slow turnover rate of the most lucrative broadcast properties, change in ownership patterns is very slow. Further, the need for race conscious policies reflects the effects of state-sanctioned discrimination.

The distress sale policy was implemented not to satisfy a quota, but to increase the diversity of ownership of broadcast outlets. The policy "may be invoked at the Commission's discretion only with respect to a small fraction of all broadcast licenses . . . and only when the licensee chooses to sell out at a distress price rather than go through with the hearing." *Shurberg*, 876 F. 2d at 950 (Wald, C.J., dissenting). Thus, both the FCC and the licensee exercise some control over when the policy takes effect. In addition, the sale of a station at "distress" prices does not infringe upon anyone's legitimate expectation of obtaining a license. The limited number of radio and television

frequencies means that "no one has a First Amendment right to a license." *Red Lion Broadcasting*, 395 U.S. at 389.<sup>37</sup> Furthermore, since the policy "lessen[s] the financial obstacles to increased minority" ownership, *Shurberg*, 876 F. 2d at 952, which are the result of discrimination that had generally excluded minority participation in the mass media, the distress sale is rationally related to the compelling interests which justify its existence.

Moreover, the FCC specifically rejected other, more restrictive alternatives when it adopted distress sales. In a ruling released the day after it adopted the distress sale policy, the Commission decided not to foster minority ownership by requiring 45-day advance public notice that a station is for sale. *Public Notice of Intent to Sell Broadcast Station*, 43 Rad. Reg. (P&F) 1 (1978). Soon afterward, the Commission rejected other minority ownership proposals originated by the Department of Commerce and advanced during the period when the Commission was considering whether to adopt the distress sale policy.<sup>38</sup> In 1980, the Commission considered and rejected a more expansive alternative to the distress sales — a direct set-aside of frequencies for minority ownership.<sup>39</sup>

The distress sale policy does not unduly burden non-minorities. "The circumstances in which distress sales arise are rare and only a small number are [sic] approved; . . . the distress sale policy . . . resulted in the transfer of only [thirty-eight] stations to minority-controlled businesses in [twelve] years,"

<sup>37</sup> See, also, *Central Florida Enterprises v. FCC*, 683 F.2d 503, 506-510 (D.C. Cir. 1982) (Licensee has an expectancy in renewal based upon past performance. Court noted that, as of that time, no "incumbent television licensee ha[d] [ever] been denied renewal in a comparative challenge.")

<sup>38</sup> Those proposals sought to enhance minority ownership opportunities through revisions to the Commission's comparative hearing, time brokerage, multiple ownership and related policies. *Petition for Issuance of Policy Statement or Notice of Inquiry by the National Telecommunications and Information Administration*, 69 F.C.C.2d 1591, 1593 (1978).

<sup>39</sup> *In the Matter of Clear Channel Broadcasting*, 78 F.C.C.2d 1345, *recon denied*, 83 F.C.C.2d 216, 218-19 (1980), *aff'd sub nom., Loyola University v. FCC*, 670 F.2d 1222 (D.C. Cir. 1982)).

which accounts for only 0.28% of all broadcast stations in the nation. *Shurberg*, 876 F.2d at 950.

Shurberg was denied nothing it was entitled to have. The fact that it did not obtain the license it sought does not require invalidation of the distress sale policy. Only if "equal protection" requires us to maintain the status quo, and to refuse to take even the smallest steps to redress the effects of 200 years of discrimination in favor of white males, can the distress sale policy be invalidated. As this Court noted in *Wygant*, however,

"As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. 'When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."

*Wygant*, 476 U.S. at 281 (citations omitted). The distress sale policy is limited and specifically addresses the effects of prior discrimination that effectively precluded minority ownership. In contrast, the burden suffered by Shurberg is minimal. Shurberg could have obtained the license only if the FCC decided at a comparative hearing that the license should go to Shurberg instead of to Faith Center. Astroline and any new applicant also could have competed for the license at that time. Thus, the application of the distress sale policy in this case merely removed the uncertain possibility that Shurberg might acquire a single television channel.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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**FEB 9 1990**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY,  
*Petitioner,*

—v.—

SHURBERG BROADCASTING OF HARTFORD, INC.,  
*Respondent.*

METRO BROADCASTING, INC.,  
*Petitioner,*

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,  
*Respondents.*

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

**BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL  
LIBERTIES UNION, THE NEW YORK CITY COMMISSION  
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AND IN SUPPORT OF RESPONDENTS IN NO. 89-453**

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### INTEREST OF *AMICI*<sup>1</sup>

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many of the affirmative action cases decided by the Court during the past fifteen years. Because these cases involve an attempt to promote diversity in the broadcast industry, they have special significance for the ACLU, which has pursued a pluralistic vision of the marketplace of ideas since its founding seventy years ago.

The New York City Commission on Human Rights was established in 1955 to combat discrimination in the City of New York. The Commission enforces New York City's human rights law and seeks to combat the effects of discrimination in the nation's largest city. The Commission has consistently supported narrowly tailored plans designed to remedy the effects of past discrimination.

NOW Legal Defense and Education Fund (NOW LDEF) was established in 1970 by leaders of the National Organization for Women as a separate nonprofit 501(c)(3) organization dedicated to working for equality of opportunity for women and men. NOW LDEF has stressed from the time of its foundation the importance of women's access to and participation in the media. Since 1970, NOW LDEF has petitioned the Federal Communications Commission on many occasions to enhance equal employment opportunities for women.

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<sup>1</sup> Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

and to increase diversity in programming by expanding coverage of issues of concern to women and by diversifying ownership and control of organs of the media.

### SUMMARY OF ARGUMENT

The complexity of affirmative action, as a moral and legal issue, is fairly reflected in this Court's fractured decisions addressing the subject. Nevertheless, certain guiding principles have emerged from the nation's struggle to overcome a legacy of discrimination whose consequences are, unfortunately but undeniably, still felt today. First, the Court has upheld narrowly tailored "remedial" plans that undo the effects of past injustice. Second, the Court has recognized that certain key institutions play a critical role in assuring the proper functioning of a democratic society. When those institutions become unrepresentative, for whatever reason, the Court has recognized the "structural" value of affirmative action in correcting the imbalance.

The FCC policies now before the Court can be justified under either model. The congressional findings of past discrimination are both entitled to respect and adequate to support an affirmative action plan. Even absent such findings, however, the desire to promote a diversity of voices within the broadcast industry, given its absolutely critical role as an information source for the American public, can and should be accepted as a compelling state interest.

Largely for that reason, we believe that the minority preference at issue in *Metro Broadcasting* and the distress sale policy at issue in *Astroline Communications* can each be upheld even under strict judicial scrutiny. We also believe, however, that the strict scrutiny standard announced last year in *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), is not the appropriate standard for reviewing affirmative action efforts authorized or

mandated by Congress. First, the text of the Constitution specifically charges Congress with responsibility for implementing the promise of equality contained in the Fourteenth Amendment. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Second, the size and diversity of the national government minimizes the chances that it will be "captured" by a transient majority interested in unjust self-enrichment. Third, unlike *Croson*, the affirmative action plans now at issue were not adopted by a legislative majority that also qualified as a benefitted group. Under these circumstances, the justification for strict scrutiny articulated in *Carolene Products* may not apply with equal force.

Additionally, we believe that both challenged policies represent narrowly tailored responses by the FCC to the dramatic and documented underrepresentation of women and minorities in the broadcast industry. The minority preference policy is not an inflexible quota that requires the selection of minority applicants for a fixed number of broadcast licenses. Rather, it only applies if the competing applicants are deemed substantially equivalent when judged by other neutral criteria. Similarly, the distress sale policy does not deprive nonminorities of any vested right or settled expectation. Its impact is therefore similar to the affirmative action plans for hiring and promotion that this Court has frequently upheld.

In sum, *amici* respectfully submit that the decision in *Metro Broadcasting* should be affirmed, and the decision in *Astroline Communications* should be reversed.

## ARGUMENT

### THE FCC AFFIRMATIVE ACTION POLICIES AT ISSUE SHOULD BE UPHELD

#### A. Narrowly Tailored Affirmative Action Plans Designed To Repair A Damaged Institution Or To Redress The Consequences Of Identifiable Past Discrimination Are Lawful

In the years since the issue was first explicitly considered by this Court in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), the legality of so-called "affirmative action" or "benign" compensatory programs that use race or gender as allocative criteria in an effort to benefit women or members of racial minorities has been discussed on at least twenty occasions.<sup>2</sup>

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<sup>2</sup> *Morton v. Mancari*, 417 U.S. 535 (1974)(upholding employment preferences for American Indians in the Bureau of Indian Affairs); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)(invalidating Social Security benefits confined to widows because purpose was not remedial); *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976)(upholding race-conscious remedies in Title VII cases); *Craig v. Boren*, 429 U.S. 190 (1976)(invalidating gender discrimination in access to 3.2 beer because not based on remedial purpose); *Califano v. Goldfarb*, 430 U.S. 199 (1977)(invalidating presumption of widow dependency because not based on remedial purpose); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977)(upholding use of racial criteria in restricting to enhance likelihood of success of minority candidates); *Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)(protecting rights under *bona fide* seniority systems even when it perpetuates the effects of past racial discrimination); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978)(upholding use of minority race as positive admissions criteria, but invalidating fixed racial quota of 16% minority admissions to medical school); *United Steelworkers v. Weber*, 443 U.S. 193 (1979)(upholding under Title VII a voluntarily established race-conscious promotion system designed to remedy the effects of past industry-wide discrimination); *Fullilove v. Klutznick*, 448 U.S. 448 (1980)(upholding congressional plan setting aside 10% of government contracts for minority owned enterprises in an effort to

(continued...)

Not surprisingly, given the difficult legal and moral issues raised by "benign" discrimination in favor of the targets of past injustice,<sup>3</sup> the Court has experienced diffi-

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<sup>2</sup> (...continued)

remedy the consequences of past industry-wide discrimination); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984)(invalidating unauthorized modification of Title VII consent decree to provide for race conscious layoffs in derogation of *bona fide* seniority system); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)(invalidating contract by public employer providing for race conscious layoffs in derogation of *bona fide* seniority system); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986)(upholding consent decree settling Title VII case extending race-conscious hiring and promotion benefits to nonvictims of past discrimination); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986)(upholding power of Title VII court to order race conscious hiring and promotion to benefit nonvictims of proven racial discrimination); *United States v. Paradise*, 480 U.S. 149 (1987)(upholding judicially imposed racial quota for promotions in order to remedy persistent violations of Title VII); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987)(upholding under Title VII voluntary plan adopted by public employer that used female gender as a "plus" factor in determining promotions to "traditionally segregated" job categories); *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(invalidating Richmond plan setting aside 30% of government contracts for minority owned enterprises in absence of a showing of remedial need). See also *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968).

In addition, *Kahn v. Shevin*, 461 U.S. 351 (1974), and *Schlesinger v. Ballard*, 419 U.S. 498 (1975), are often cited as examples of affirmative action. *Amici* believes, however, that characterization is inapt. *Schlesinger* involved the use of differential rules to reflect actual differences in career ladders faced by men and women in the armed services. It was in no sense a remedial case. *Kahn* involved a purported remedial statute that was, in reality, driven by a stereotypical view of the role of women that was rejected by this Court in *Weinberger*, *supra*, and *Craig v. Boren*, *supra*. The majority's unquestioning acceptance of the existence of a remedial motive in *Kahn* appears at variance with its treatment of sex based distinctions in later cases.

<sup>3</sup> Compare A. Bickel, *The Morality of Consent* 133 (1975)("a racial (continued...)

culty in articulating a set of general principles governing affirmative action.<sup>4</sup> However, despite the often fragmented nature of the Court's decisions,<sup>5</sup> *Amici* believes that the Court's jurisprudence yields valuable general principles that suggest a constructive path through the legal and moral thicket posed by affirmative action.<sup>6</sup>

In a perfect world, race or gender would almost never be a permissible criterion for the allocation of a valuable benefit.<sup>7</sup> It is, after all, an article of our collective faith that a free market in talent should be the

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<sup>3</sup> (...continued)

quota derogates the human dignity and individuality of all to whom it is applied") with R. Dworkin, *Taking Rights Seriously* 227-29 (1978) (affirmative action is consistent with an individual's right to equal respect and concern).

<sup>4</sup> See Choper, "Continued Uncertainty of Remedial Race Classifications: Identifying Pieces of the Puzzle," 72 Iowa L.Rev. (1987).

<sup>5</sup> The Court has considered the constitutionality of affirmative action plans in seven cases. In five of those cases, the Court was unable to issue a majority opinion. *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). Five Justices joined Justice O'Connor's decision for the Court in *Croson* and Justice Douglas' opinion for the Court in *Kahn v. Shevin*.

<sup>6</sup> *Amici* has not attempted to distinguish Title VII cases from constitutional cases in assessing the legality of affirmative action plans for the purposes of this case. It is certainly possible to articulate differing standards under the Equal Protection Clause and Title VII concerning the legality of affirmative action, but this Court has appeared to view the governing standards as indistinguishable.

<sup>7</sup> E.g. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). For an example of a rare setting in which race was deemed an appropriate employment criterion, see *Morton v. Mancari*, 417 U.S. 535 (1974).

determinant of an individual's fate. But we do not live in a perfect world. The distribution of wealth and power in our society has been skewed by two undeniable historical facts that have impeded the operation of a true free market in talent. First, racial minorities in the United States have been the target of massive -- and, until relatively recently -- governmentally sanctioned racial discrimination that has severely limited their opportunity to compete fairly for the rewards of a free market in talent.<sup>8</sup> Second, women have been denied the freedom to compete equally with men because a governmentally endorsed ideology confined them to stereotypical roles as wives and mothers, denying many women the opportunity to develop their full human potential.<sup>9</sup>

In the years since the Second World War, our society has succeeded in forging a jurisprudence of fairness that forbids the most explicit forms of race and gender discrimination. But the welcome enunciation of prospective norms of racial and sexual justice has not eliminated the consequences of centuries of discrimination. Women and racial minorities remain radically underrepresented in critical areas of American life. Over the long run, vigorous enforcement of our existing anti-discrimination norms, coupled with adequate educational opportunity, offer our best hope for a color-blind and a gender-blind

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<sup>8</sup> See e.g., *Prigg v. Pennsylvania*, 41 U.S. 539 (1842); *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Harris*, 106 U.S. 629 (1882); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Baldwin v. Frank*, 120 U.S. 687 (1887); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Giles v. Harris*, 189 U.S. 475 (1903); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Breedlove v. Suttles*, 302 U.S. 277 (1937); *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>9</sup> See e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley J. concurring) ("The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator"); *Minor v. Happersett*, 88 U.S. 162 (1875); *Goesart v. Cleary*, 335 U.S. 464 (1948); *Hoyt v. Florida*, 368 U.S. 57 (1961).

future. In at least two settings, however, the Court's affirmative action jurisprudence has made clear the legitimacy of hastening the corrective process by favoring members of the underrepresented groups.

First, this Court has upheld the use of race or gender based remedial plans to undo the consequences of identifiable past discrimination.<sup>10</sup> As this Court has recognized, absent race or gender based "remedial" plans, victims would remain uncompensated; wrongdoers would stand uncorrected; and innocent third persons would unintentionally reap the unearned benefits of discrimination as a form of unjust enrichment.<sup>11</sup> Thus, while areas of uncertainty continue to exist as to the nature of the past discrimination that may trigger a remedial plan;<sup>12</sup> the quantum of evidence needed to document the discrimination;<sup>13</sup> the identity of the institu-

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<sup>10</sup> E.g. *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976); *Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *United States v. Paradise*, 480 U.S. 149 (1987); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). But see *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(invalidating Richmond plan setting aside 30% of government contracts for minority owned enterprises in absence of a showing of remedial need).

<sup>11</sup> See Neuborne, "Observations on Weber," 54 N.Y.U.L.Rev. 546, 548-49, n.9 (1979).

<sup>12</sup> Compare *Kahn v. Shevin*, 416 U.S. 312 (1974) and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987)(broad societal discrimination may trigger voluntary efforts at remedial process) with *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(past discrimination must occur in particularized setting).

<sup>13</sup> Compare *Fullilove v. Klutznick*, 448 U.S. 448 (1980) with *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989).

tion that must certify or acknowledge the discrimination;<sup>14</sup> and the identity of the beneficiaries,<sup>15</sup> the Court's opinions provide significant guidance against which to measure the legality of a "remedial" affirmative action plan. Specifically, once Congress has determined that past discrimination has resulted in an ongoing failure to include women or racial minorities in a desirable economic setting, narrowly tailored "remedial" efforts to increase their future participation have been deemed lawful. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Morton v. Mancari*, 417 U.S. 535 (1974).

Second, where historic patterns of discrimination have resulted in the absence of women and racial minorities from significant American institutions whose proper functioning is impeded by the resulting imbalance, this Court has recognized a "structural" need to repair the damaged institution through the use of race or sex as an allocative criteria. For example, in *Morton v. Mancari*, 417 U.S. 535 (1974), a unanimous Court upheld the constitutionality of employment preferences for American Indians in the Bureau of Indian Affairs because the preferences were necessary to permit the Bureau to carry out its mission of enhancing Indian self-government. Similarly, in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), the Court upheld an explicit racial gerrymander under the Voting Rights Act designed to enhance the likelihood that racial minorities

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<sup>14</sup> See e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979)(judicial finding of past discrimination unnecessary, so long as reasonable apprehension of past discrimination present); *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(legislative finding of past discrimination invalid in absence of relevant evidence).

<sup>15</sup> See *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986)(authorizing consent decree benefits to nonvictims); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986)(authorizing court awarded benefits to nonvictims).

would be elected in New York City. In *United Jewish Organizations*, the Court was confronted with a breakdown in the democratic process that had reduced voter participation in areas of New York City to less than 50% of the eligible voting population, thus triggering the provisions of the Voting Rights Act. While the causes of the breakdown did not involve proven, or even suspected, unconstitutional behavior on the part of New York City officials,<sup>16</sup> both the Department of Justice and this Court recognized that the imperative of repairing central democratic institutions justified Congress' decision to provide for the use of race conscious district lines, despite the adverse impact on white voters. Likewise, Justice Powell's determinative opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 269 (1978), upheld the use of race conscious admissions criteria in institutions of higher education because the absence of women and minorities from educational institutions was adversely affecting the educational mission. As Justice Powell understood, not only does the very presence of women and minorities in an academic setting act to dispel negative stereotypes, but their presence and participation enriches the educational climate by introducing divergent perspectives and viewpoints. No professor who has taught classes that have evolved from all white male enclaves prior to *Bakke* into multi-racial, gender-blind colloquia would dispute the wisdom of Justice Powell's insight that affirmative action on behalf of women and racial minorities is justified, not merely to remedy the ongoing consequences of past discrimination, but to enrich the academic free market in ideas that is artificially impoverished by their absence.

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<sup>16</sup> In *UJO*, the provisions of the Voting Rights Act were triggered by the low voter turnout and the historic use of a literacy test in New York City. This Court had upheld the constitutionality of literacy tests in local elections. See *Lassiter v. Northampton Board of Elections*, 360 U.S. 45 (1959).

Thus, while "remedial" use of race or gender is designed to undo the continuing consequences of past identifiable discrimination, "structural" affirmative action involves the repair of an institution of importance to American society whose functioning is currently impaired by the historic exclusion of women and minorities. See also *Taylor v. Louisiana*, 419 U.S. 522 (1975)(jury integrity imperilled by laws encouraging nonparticipation by women); *Duren v. Missouri*, 439 U.S. 357 (1979).

Of course, this Court has recognized that the decision to use race or gender as an allocative criterion, whether driven by a "structural" desire to repair a damaged institution or by a "remedial" desire to right a past wrong, must be tempered by the impact on third persons whose interests will be affected by the use of such criteria. Thus, where an innocent third person is asked to surrender a settled status, the Court's decisions suggest that even a valid "structural" or "remedial" use of race or sex may be unduly disruptive of earned expectations.<sup>17</sup> Where, however, a third person is asked to forego a mere expectancy, the Court has held that the imperative of repairing a damaged institution or righting a past wrong will generally justify the use of otherwise irrelevant criteria.<sup>18</sup>

Finally, the inevitable disagreements that will arise over whether recourse to "remedial" or "structural" af-

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<sup>17</sup> E.g. *Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

<sup>18</sup> *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). Compare *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)(invalidating layoffs) with *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986) and *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986)(upholding promotions and hiring).

firmative action is warranted in particular settings,<sup>19</sup> and the difficult moral calculus required to assess third person loss,<sup>20</sup> raise troubling questions of relative institutional competence. In resolving those questions, this Court has held that the absence of a perceived danger of majoritarian overreaching justifies a more deferential standard of judicial review when evaluating congressionally designed affirmative action plans, whether "structural" or "remedial."<sup>21</sup> See pp.18-19, *infra*.

**B. The FCC Affirmative Action Plans At Issue Herein Are Valid Both As Congressionally Imposed "Structural" Attempts To Enhance The Diversity Of Viewpoint On The Broadcast Spectrum And As "Remedial" Attempts To Mitigate The Consequences Of Past Discrimination**

Congress has directed the FCC to continue two policies designed to increase the number of broadcast frequencies that are owned or controlled by women or

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<sup>19</sup> In a "remedial" context, the issues include (1) whether a reasonable apprehension of past discrimination exists; (2) the identity of the institution that may acknowledge the past discrimination; and (3) the causal nexus between the past discrimination and the present imbalance. In a "structural" setting, the principal issue is whether the imbalance adversely affects the optimum functioning of a critical democratic institution.

<sup>20</sup> In order to engage in the balancing process, the precise loss to third persons must be identified and weighed against the importance of remedying a past wrong or repairing a current institution.

<sup>21</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (Congress dominated by white males elects to give preference to minorities; subjected to deferential scrutiny); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (Congress dominated by white males seeks to improve minority representation; subjected to deferential scrutiny).

members of racial minorities.<sup>22</sup> One policy, at issue in the *Metro Broadcasting* case, grants applicants that are owned or controlled by women or by members of racial minorities a preference in comparative broadcast licensing proceedings.<sup>23</sup> As between substantially equivalent applicants, FCC policy resolves the issue in favor of expanding the number of broadcast voices that are owned or controlled by women or racial minorities. The second policy, at issue in the *Astroline* case, permits a current licensee who is in significant danger of losing a

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<sup>22</sup> The affirmative action policies at issue were initially adopted by the FCC pursuant to its broad mandate to serve the "public interest." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). The basis for the policies is set forth in *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965); *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978); FCC Minority Ownership Task Force, *Minority Ownership in Broadcasting* (1978); *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

The judicial history of the policies may be traced through *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C.Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Garrett v. FCC*, 513 F.2d 1056 (D.C.Cir. 1975); *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C.Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *Steele v. FCC*, 770 F.2d 1192 (D.C.Cir. 1985), *vacated and remanded*, 806 F.2d 1126 (D.C.Cir. 1986); *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C.Cir. 1989), *cert. granted*, \_\_\_ U.S. \_\_\_ (1990); *Shurberg Broadcasting of Hartford v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted*, \_\_\_ U.S. \_\_\_ (1990).

Congress' initial expression of support for affirmative action in the FCC context may be found in its approval of the use of racial or gender preferences in connection with the lottery method for allocating broadcast frequencies. See H.R.Conf.Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

<sup>23</sup> The use of minority ownership as a "plus" factor in comparative license proceedings was initially discussed in *WPIX, Inc.*, 68 F.C.C.2d 381 (1978). The granting of a "plus" factor to female ownership was initially discussed in *Gainsville Media, Inc.*, 70 F.C.C. 143 (Rev. Bd. 1978) and *Mid-Florida Television Corp.*, 69 F.C.C.2d 607 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981).

broadcast license to transfer the license pursuant to a "distress sale" for not more than 75% of its value to an entity that is owned or controlled by a racial minority.<sup>24</sup>

When the FCC announced the possibility of abandoning its affirmative action policies in 1987, Congress explicitly responded by inserting a provision in the 1988 appropriations bill for the FCC forbidding the agency from altering its existing policies. A similar provision was inserted into the 1989 and 1990 FCC appropriations bills. Continuing Appropriations Act for the Fiscal Year 1988, Pub.L. No. 100-202, 101 Stat. 1329; Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub.L. No. 100-459, 102 Stat. 2216-17; Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub.L. No. 101-162, 103 Stat. 1020-21. Congress' thrice-repeated decision to mandate the continuation of the FCC's affirmative action policies constitutes a considered congressional policy choice entitled to respect by the coordinate branches.

**(1) Both The Comparative Preference And Distress Sale Plans Are Valid "Structural" Attempts To Enhance Viewpoint Diversity On The Broadcast Spectrum**

By mandating the continuation of the FCC's affirmative action policies, Congress sought both to redress past

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<sup>24</sup> Ordinarily, a licensee whose qualifications are in question may not sell its broadcast license until the FCC has resolved its doubts in a noncompetitive hearing. *Northland Television, Inc.*, 42 Rad.Reg.2d (P&F) 1107 (1978). The initial use of distress sales was an exception to the general policy of nontransferability in cases of bankruptcy or disability. In 1978, the FCC expanded the category of distress sales to include sales to purchasers owned or controlled by racial minorities. See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 979, 983 (1978).

discrimination<sup>25</sup> and to repair a critical American institution imperilled by the virtual absence of voices controlled by women and racial minorities from the broadcast spectrum. Congress realized that the artificial absence of broadcast voices owned or controlled by women and racial minorities endangers the integrity of the free market in ideas.<sup>26</sup> Cf. *Taylor v. Louisiana*, 419 U.S. 522 (1975)(absence of women from jury venire threatens integrity of fact-finding process). As Justice Powell recognized in *Bakke* and as this Court recognized in *United Jewish Organizations*, the artificial absence of a

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<sup>25</sup> Given the clear "structural" justification for Congress' decision to adopt an affirmative action plan, it is not necessary to consider at length whether the plan should be also upheld as a "remedial" plan, and our brief does not do so.

It is worth noting, however, that Congress expressly found that the absence of women and racial minorities from the broadcast spectrum was a result of historic patterns of discrimination. See H.R.Conf.Rep. No. 765, 97th Cong., 2d Sess. 43 (1982). Given the deferential standard of review that governs congressional decisions to recognize the consequences of past patterns of discrimination, see *Fullilove*, Congress' finding of past discrimination affecting the broadcast industry is sufficient to justify a narrowly tailored "remedial" affirmative action plan. *Id.*

It is also worth noting that the exclusion of women and minorities from the broadcast industry is due to more than generalized societal discrimination. As demonstrated in the *amicus* brief submitted by the Congressional Black Caucus, *et al.*, the FCC's past policies and practices contributed to this discriminatory pattern.

<sup>26</sup> This finding by Congress parallels the conclusion of the FCC, whose 1978 report on minority ownership noted:

Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

*Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978).

significant segment of the populace from one of the core institutions of representative democracy threatens the integrity of the democratic process by eliminating a potential source of different perspectives. It is no coincidence, therefore, that the contexts in which this Court has recognized the imperative of "structural" affirmative action have involved the central institutions of representative democracy: the electoral process in *United Jewish Organizations*; the process of higher education in *Bakke*; the jury in *Taylor*; and the desire for Indian self government in *Morton v. Mancari*.

This case involves an application of the identical principles to the most significant vehicle for communication in a modern democratic society, the scarce societal resource of the broadcast spectrum. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Acknowledging that the FCC's affirmative action policies promote viewpoint diversity does not mean that all members of a group think or believe the same thing. Obviously, a broad divergence of views will exist within every group. However, when the voice of an entire segment of the populace is absent from one of the core institutions of representative democracy, a significant danger is created that a divergent point of view will be overlooked.<sup>27</sup>

Indeed, for precisely that reason, Section 307(b) of the Communications Act, 47 U.S.C. §307(b), currently grants a dispositive preference to the first applicant to provide local broadcast service to an otherwise unrepresented locality. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). See *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132 (D.C.Cir. 1985); *Radio Jonesboro, Inc.*, 96

<sup>27</sup> As Congress observed in 1987: "Diversity of ownership results in diversity of programming." S.Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). Five years earlier, Congress observed that the "nexus" between minority ownership and diversity has been "repeatedly recognized." H.R.Conf.Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

F.C.C.2d 1106, 1109 (Rev. Bd. 1984), *aff'd*, 100 F.C.C.2d 941 (1985)(local residence as "plus" factor). One need not assume that all residents of a particular locality will think or believe the same thing to recognize the danger of leaving a locality entirely unrepresented in the broadcast spectrum. The goal in both settings is the same: to allocate scarce broadcast frequencies so as to assure the expression of as many divergent viewpoints as possible and to assure that no discernible segment of American society is left voiceless in the broadcast spectrum.<sup>28</sup>

## **(2) Congress' Decision To Adopt An Affirmative Action Policy Is Subject To A Deferential Level Of Scrutiny**

As with any "structural" affirmative action program, reasonable people may differ over whether the institution at issue is in need of repair and whether the precise plan unfairly "trammels" the interests of innocent third persons. In this case, Congress has made a considered judgment that the absence of female and minority controlled voices from the broadcast spectrum impairs the optimal functioning of an important American institution and has mandated two corrective programs in an effort to repair the institution. A threshold issue, therefore, is the level of judicial scrutiny to which Congress' judgment may properly be subjected.

In *Croson*, Justice O'Connor, writing for the Court, suggested that the use of "suspect" criteria such as race or sex in the allocation of local government benefits

<sup>28</sup> This Court has endorsed the FCC's attempts at securing diversity by upholding bans on cross ownership of broadcast facilities and newspapers in the same geographical setting, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), and by applying the antitrust laws to the communications industry. *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951). See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

should be subjected to the most searching level of judicial scrutiny -- a requirement that it advance a compelling state interest by the least drastic means. While *amici* believes that the policies at issue in these cases satisfy even the most rigorous level of judicial scrutiny, three reasons exist to apply a more deferential standard of review to congressional judgments to resort to affirmative action.

First, as the Court noted in *Croson*, Congress is vested with unique powers and responsibilities to enforce the Equal Protection Clause of the Fourteenth Amendment.<sup>29</sup> Where, as here, Congress makes a judgment that the attainment of the goals of the Equal Protection Clause can best be achieved through the adoption of an affirmative action plan, proper respect for the constitutional structure requires a significant level of deference to Congress. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Morton v. Mancari*, 417 U.S. 535 (1974).

Second, as Justice Scalia noted in his concurrence in *Croson*, the smaller the local governmental unit, the greater the danger of "capture" by a transient majority bent on unfair treatment of the local minority. Thus, whatever the wisdom of deploying strict scrutiny at the local level as a prophylactic check against majoritarian overreaching, no basis exists to deploy it at the national level when Congress seeks to benefit minorities. When affirmative action plans are at issue, the very size and complexity of our pluralistic society at the national level provides the needed institutional check against unfair

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<sup>29</sup> Although the Fifth Amendment, which controls the constitutionality of an Act of Congress, does not contain an explicit equal protection clause, this Court has ruled that the due process language of the Fifth Amendment subsumes the equal protection language of the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

use of affirmative action by Congress. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (representation of state interests in Congress permits Eleventh Amendment override by congressional action).

Finally, in *Croson*, the local legislative body that made the decision to invoke a minority set-aside program was controlled at the time by one of the groups the plan was designed to benefit. Where a local majority elects to benefit itself at the expense of members of another race, this Court apparently concluded in *Croson* that traditional *Carolene Products* analysis calls for strict judicial scrutiny of the decision. See J. Ely, *Democracy and Distrust* (1980).<sup>30</sup> Where, however, a legislative body elects to benefit radically underrepresented groups at the expense of the political majority, as in *Fullilove* or *Morton v. Mancari*, there is no equivalent basis for judicial suspicion of that legislative decision.

**(3) Both Plans Under Review Advance A Compelling State Interest, Are Narrowly Tailored And Do Not Unfairly Affect The Interests Of Third Persons**

Whatever level of scrutiny is applied, the affirmative action policies now under review pass constitutional

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<sup>30</sup> The suggestion in *Croson* that strict scrutiny is required whenever a local legislative body acts to benefit the racial group that controls the legislature appears to overstate the power of local legislatures. When, as in *Croson*, the state legislature, the Congress, and the surrounding economic community are all overwhelmingly white, *amici* do not believe that strict scrutiny is necessary.

In any event, strict scrutiny should not be applied to the gender based preference at issue in *Metro Broadcasting* since this Court has consistently declined to apply strict scrutiny to test the validity of gender based classifications. It would be fundamentally unfair to refuse to apply strict scrutiny to gender based classifications that harm women, but to insist upon strict scrutiny of classifications designed to assist them.

muster. Specifically, the FCC's affirmative action policies can and should be upheld as narrowly tailored efforts at advancing a compelling governmental interest.

As *amici* has noted, the compelling governmental interest is the attempt to assure that no significant segment of American society is left voiceless in the broadcast spectrum. Given the virtual absence of broadcast licenses owned or controlled by women or minorities,<sup>31</sup> Congress had an adequate factual predicate for its fear that the existing distribution of broadcast licenses threatened the integrity of the free market in ideas. Just as Congress is justified in fearing the exclusion of geographical voices from the spectrum, so it is justified in fearing the social consequences of the absence of voices controlled by women and minorities. Precisely such a "structural" interest in enhancing diversity of viewpoint was deemed compelling in *Bakke*; was found sufficient to justify affirmative action plans in *United Jewish Organizations* and *Morton v. Mancari*; and underlay the Court's reasoning in *Taylor v. Louisiana*. Thus, unlike *Croson*, a factual predicate for the use of affirmative action by the FCC was clearly established by Congress, whatever the standard of review.

**(a) The Narrowly Tailored Nature Of The Use Of Race Or Gender As A "Plus" Factor In Comparative Licensing Proceedings**

The use of race or sex as a "plus" in a comparative licensing proceeding imposes virtually no loss on third persons. Since the preference can be dispositive only when the contending applicants are substantially equiva-

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<sup>31</sup> When the FCC initially adopted its affirmative action policy, fewer than 1% of broadcast licenses were owned or controlled by members of racial minorities. *FCC Statement of Policy on Minority Ownership of Broadcasting Facilities* (1978). See n.22, *supra*.

lent by other measures, the preference merely operates, in effect, to deny third persons the "right" to a random breaking of a tie. Where Congress has determined that the free market in ideas would be strengthened by encouraging otherwise absent voices on the broadcast spectrum, the use of race or sex to break a tie between equivalent broadcast candidates should not pose a close call.<sup>32</sup> Indeed, it is precisely the technique that was upheld in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

**(b) The Narrowly Tailored Nature Of The "Distress Sale" Policy**

Given the exceptionally narrow reach of the comparative licensing policy, it has been impossible to mount a convincing argument that it sweeps too broadly and unnecessarily "trammels" the interests of third persons. On the other hand, Judges Silberman and MacKinnon deemed the "distress sale" policy unduly broad because they perceived it as an absolute bar to the participation of nonminority bidders in the distress sale process and thus analogous to the fixed racial quota struck down in *Bakke*.<sup>33</sup> That view overstates the impact of the distress sale policy on third persons in several important ways.

First, unlike the layoffs in *Wygant* or the seniority rules in *Stotts* and *Teamsters*, the distress sale policy does not oust a third person from a settled status or act to

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<sup>32</sup> This is not a case where race or sex is given so much weight in a comparative proceeding that it outweighs a clear advantage in traditional qualifications possessed by a third person. Even in such settings, moreover, this Court has held that affirmative action plans would be valid. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). *A fortiori*, such plans are valid when the contending candidates are otherwise equally qualified.

<sup>33</sup> The distress sale affirmative action policy benefits members of racial minorities, but not women.

frustrate vested expectations. As such, its impact is far closer to the frustration that a third person suffers whenever an affirmative action hiring or promotion plan is established. It is certainly no greater than the frustration experienced by third persons in *Fullilove*, *Weber*, *Paradise*, or *Johnson*.

Moreover, the existence of an actual injury-in-fact cannot be assumed merely because the distress sale policy has been invoked. In *Bakke*, there was ample reason to believe that the 16% quota materially diminished the plaintiff's chances of gaining admission to medical school.<sup>34</sup> Under the FCC rules, however, no prospective licensee had access to a distress sale prior to the adoption of the affirmative action plan.<sup>35</sup> If that plan were struck down, all prospective licensees would presumably be remanded for a comparative licensing proceeding in which ties would be broken in favor of the minority broadcaster. Unless the record demonstrates that a nonminority applicant would have defeated the minority broadcaster in this comparative proceeding or, at the very least, was foreclosed from meaningful "competition" for the broadcast license, *Bakke*, 438 U.S. at 305, the distress sale provisions have not "caused" the nonminority broadcaster any discernible loss. See e.g., *Carey v. Phipps*, 435 U.S. 247 (1978); *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977); *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).<sup>36</sup>

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<sup>34</sup> *Bakke's* scores made it highly likely that he would have been admitted to the Davis Medical School but for the minority admissions quota. 438 U.S. at 276-77.

<sup>35</sup> Distress sales were permitted to avoid bankruptcy or other similar emergency. The adoption of the affirmative action plan in no way affects the emergency distress sale proceeding which remains open to all bidders.

<sup>36</sup> Here, the record is silent on the relative qualifications of the com-  
(continued...)

Second, the distress sale policy has affected only a miniscule portion of the national market in broadcast licenses. According to the record, only 33 stations were transferred to minority owners via a distress sale during a seven year period in the 1980's. This total "represent[s] 0.28% of all broadcast stations in the United States, far below the 10% of annual public works appropriations directed to minority businesses in *Fullilove*." *Shurberg Broadcasting*, 876 F.2d at 950-51 (Wald, J., dissenting)(footnote omitted).

Finally, the decision below mischaracterizes the actual "disqualification" suffered by third persons under the current distress sale rules. Contrary to the suggestion of the lower court, nonminorities are not absolutely disqualified from economic participation in the distress sale process. They are eligible without restriction to participate in both limited and general partnerships in connection with a distress sale so long as the broadcasting entity is controlled by a racial minority.<sup>37</sup> Since the purpose of the distress sale is to increase minority-controlled voices, nonminorities are permitted -- indeed encouraged -- to participate economically in the "bargain

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<sup>36</sup> (...continued)

peting applicants in *Astroline Communications*. At most, therefore, the matter should be remanded to the FCC to permit *Shurberg Broadcasting* to show that it has suffered an injury-in-fact from the distress sale rules that would be redressed by a decision striking them down. Otherwise, there is a serious question of Article III standing under this Court's opinions. See *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976).

<sup>37</sup> In 1982, the FCC extended eligibility for the program to limited partnerships in which the general partner was a member of a minority group and owned at least 20 percent of the purchasing entity. Under this policy, it remains possible for nonminorities to play extensive roles in the distress sale process. *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

sale" process as long as they cede control of the broadcaster to an otherwise radically underrepresented minority voice. In effect, the distress sale policy offers non-minorities a generous economic discount if they will help to finance a minority controlled broadcast voice, but denies them the windfall benefit if they insist upon adding yet another majority voice to the broadcast spectrum. Such a policy of economic incentive hardly resembles a violation of the anti-discrimination principle.

**(c) Congress Should Not Be Required To Adopt  
Programmatic Controls As A Means Of  
Promoting Broadcast Diversity**

Attempts to assure that divergent viewpoints are adequately present on the broadcast spectrum could conceivably take the form of substantive content regulation. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). However, government attempts at regulating media content are fraught with First Amendment pitfalls. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *FCC v. League of Women Voters*, 468 U.S. 364 (1984). Moreover, even if substantive regulation were permissible, its desirability is, to say the least, questionable. Instead, Congress has opted for a structural attempt to assure the optimum functioning of the free market in ideas. Given the unquestioned factual predicate for Congress' action and the narrowly tailored nature of the FCC's affirmative action policies, no basis exists for judicially second guessing the considered judgment of Congress.

**CONCLUSION**

For the above stated reasons, the decision in *Metro Broadcasting, Inc. v. FCC*, No. 89-453, should be affirmed and the decision in *Astroline Communications Co. v. Shurberg Broadcasting*, No. 89-700, should be reversed.

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Dated: February 9, 1990

**MAR 5 1990**

**JOSEPH F. SPANIOL, JR.**

**CLERK**

**No. 89-700**

**IN THE  
SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1989**

**ASTROLINE COMMUNICATIONS  
COMPANY LIMITED PARTNERSHIP,  
Petitioner,**

**v.**

**SHURBERG BROADCASTING OF  
HARTFORD, INC.,  
Respondent.**

**On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit**

**BRIEF OF  
SOUTHEASTERN LEGAL FOUNDATION, INC.  
AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENT**

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No. 89-700

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**SHURBERG BROADCASTING OF  
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Respondent.

**On Writ of Certiorari to the  
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for the District of Columbia Circuit**

**INTEREST OF AMICUS**

The Southeastern Legal Foundation, Inc. ("Southeastern") submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief and their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Dedicated to economic and social progress

through the equitable administration of law, Southeastern presents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Towards that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *South Florida Chapter of the AGC of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir. 1984), cert. denied 469 U.S. 871 (1984); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); and *City of Richmond v. J.A. Croson Co.*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 706 (1989).

Southeastern has filed numerous *amicus curiae* briefs in the federal courts at all levels expressing its opposition to racial preferences which do not comply with the strict scrutiny standard of constitutional review. Southeastern submitted its views in *United Steel Workers of America v. Weber*, 563 F.2d 216 (5th Cir. 1977), rev. 443 U.S. 193 (1979); *Cramer v. Virginia Commonwealth University*, 586 F.2d 297 (4th Cir. 1978); and *S.J. Groves & Sons Co. v. Fulton County*, 696 F.Supp. 1480 (N.D. Ga. 1987) (Appeal pending). Southeastern represented a non-minority subcontractor who challenged the administration of the minority and disadvantaged business enterprise provision of the Surface

Transportation Assistance Act of 1982 by the North Carolina and United States Departments of Transportation. *Carpenter v. Dole, et al.*, File No. 85-527-CIV-5 (U.S.D.C. E.D.N.C.), vacated and remanded, *Carpenter v. Barnhart, et al.*, No. 88-3578 (4th Cir. 1990) (unpublished opinion, January 16, 1990).

### STATEMENT OF THE CASE

*Amicus* adopts the statement of the case contained in the brief on behalf of Respondent, Shurberg Broadcasting of Hartford, Inc.

### SUMMARY OF ARGUMENT

The standard of strict scrutiny should be applied to the racial preference policies of the FCC. This Court should not adopt a standard of review for race-conscious policies of the Federal Government, including Congress, which would allow strict scrutiny to be satisfied by legislative enactments lacking a firm factual basis.

The FCC's distress sale policy is not a program which was promulgated by Congress. In ratifying the FCC's programs and in prohibiting the Commission from conducting a reexamination and reevaluation of its racial preference policies, through amendments to appropriation bills, Congress has engaged in the type of casual legislative use of racial preferences which is prohibited by this Court's decisions.

The FCC's race-conscious policies make no effort to prevent persons who are not disadvantaged from benefiting from the program based solely on their race. For this reason, the program is not narrowly tailored, and it also lacks the fundamental moral and ethical justifications relied upon in *Fullilove* and elsewhere to justify the limited use of racial preferences for remedial purposes.

### ARGUMENT

#### I.

**The Supreme Court Has Now Unequivocally Held That Strict Scrutiny Is The Proper Standard Of Review For Government Use Of Racial Preferences, And That Standard Should Be Applied To The FCC's Race-Based Programs.**

In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758 (1980), this Court upheld the constitutionality of a Congressional enactment providing for a ten percent set aside of funds expended under a federal statute for firms categorized as minority business enterprises. Although the Court decided numerous other significant affirmative action cases in the meantime, some of which involved issues similar to that presented by the use of racial preferences in public contracts, it was not until 1989 that the Court again directly confronted the

question of the use of racial or ethnic preferences in the awarding of public contracts, in *City of Richmond v. J.A. Croson Company*, 488 U.S. \_\_\_, 109 S.Ct. 706 (1989). (Hereinafter "*Richmond*" or "*Croson*.")

Although there were six opinions written in *Croson*, there was, for the first time, an agreement by a majority of the Justices on one key point: *any* legislation based on racial classifications -- regardless of the motivation, and of whether it benefits minorities or non-minorities -- must be examined under a "strict scrutiny" standard. *Richmond v. Croson*, 109 S.Ct. at 722-23, 735; Justice O'Connor's opinion (joined by the Chief Justice, Justice White and Justice Kennedy) 109 S.Ct. at 722-23; Justice Scalia's opinion, 109 S. Ct. at 735.

The *Croson* opinion dealt with the constitutionality of a local minority business enterprise ordinance, without any overtones of federal participation or Congressional authorization. This distinction, however, does not alter the fact that a majority of this Court unequivocally adopted the strict scrutiny standard for any use of race-based remedial measures. In *Croson's* extensive discussion of this Court's *Fullilove* decision, there are references to the standard of review, found in Chief Justice Burger's opinion in *Fullilove*. 109 S.Ct. at 717-18.

*Amicus* submits that the different level of scrutiny applied in *Fullilove's* principal opinion stemmed not from any difference in the

level of review to be given Congressional enactments, as opposed to those of state or local governments, but from the Court's lack of consensus (until *Croson* in 1989) as to whether a different standard should apply to "reverse," or "benign," or "well-intentioned" discrimination, as opposed to "invidious," or "evil" discrimination. That argument has been resolved. In *Croson*, it was held by a majority of the Justices that *any* race-conscious law will be subjected to strict judicial scrutiny.

While Section 5 of the Fourteenth Amendment may be considered an expansion of Congressional power, and Section 1 of that amendment may be considered a limitation on the power of the states and local governments only, the Congressional power to deny equal protection is *also* limited -- by the Fifth Amendment. That limitation on Congressional use of suspect classifications is identical to that imposed upon the States by the Fourteenth Amendment. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("This Court's approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment."); see also, *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975). Thus, Congress is constitutionally prohibited from utilizing racial classifications in circumstances in which the States would be prohibited from doing so.

It is important to note that *Richmond v. Croson*, while acknowledging that Congress "may identify and redress the effects of society-wide discrimination," 109 S.Ct. at 719, also stressed that any use of racial preferences by government must satisfy the test of strict scrutiny. 109 S.Ct. at 720-21. The Court's opinion in *Croson* also made a pointed reference to the wartime action of the federal government considered in *Korematsu v. U.S.*, 323 U.S. 214, 235-40, 65 S.Ct. 193, 202-05 (1944) (Murphy, J., dissenting), stating that "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Richmond v. Croson*, 109 S.Ct. at 725.

The essence of the Court's holding in *Richmond* is that, whatever may be the professed motivation for governmental use of race, it must always be based upon a compelling governmental interest, for the basic reason that the use of race is always inherently suspect and that, in the absence of necessary safeguards, it has great potential for harm to the principles of our democratic society. "Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Richmond v. Croson*, 109 S.Ct. at 721.

*Amicus* submits that there is every rea-

son to apply the strict scrutiny standard to the FCC's racial preference policies. Particularly where the policies result not from express Congressional direction, but from agency actions later ratified and then "frozen" by Congress, application of the strict scrutiny test is mandated by this Court's decisions.

## II.

### **The Actions Of Congress, Consisting Primarily Of Endorsements Of FCC Programs And Prohibitions Against Re-Examination Of Those Policies, Do Not Satisfy The Demands Of Strict Scrutiny.**

*Amicus* urges this Court to apply the strict scrutiny standard of review to the racial preference policy at issue here, and also to apply that standard to the Congressional actions in this case. When those actions are tested against the requirements of strict scrutiny, it is evident that the Congress has not, through anything it has done, established the requisite compelling interest for utilization of racial criteria.

It should initially be reiterated that the program challenged in this case is not one which was enacted by Congress, nor is it one which was promulgated pursuant to Congress' powers under Section 5 of the Fourteenth Amendment. As noted in the brief on behalf of the FCC, the Commission's minority preference policies arose as the result of judicial review and intrusion into

the FCC's licensing proceedings. Brief for FCC, pp.2-5. The distress sale policy was initiated by the Commission in 1978. Subsequently, the Commission undertook an inquiry into the validity of its minority and female ownership policies, and that attempt at reexamination and reevaluation led to Congress' actions taken through amendments to appropriations bills. *Id.*, pp.11, 15-16.

Congress' primary involvement has thus been to prohibit the Commission from determining whether its racial preference policies were well founded, either legally or factually. See *Winter Park Communications v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *cert. granted sub nom Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 715 (1990).

Whatever may have been the degree of Congressional inquiry into the success of the FCC's policies, in promoting diversity in programming, it is apparent that the record before Congress is woefully lacking in finding any present effects of past discrimination in the broadcast industry itself. As stated by Judge Silberman's opinion below, the "general findings of minority underrepresentation in the broadcasting field differ . . . from the congressional findings the Court encountered in *Fullilove*." *Shurberg*, 876 F.2d at 915. As noted in that section of Judge Silberman's opinion, this Court's decisions have made clear that underrepresentation, by itself, "cannot be sufficient proof of the effects of past societal discrimination." *Id.* at 915.

In and of themselves, racial preferences can never constitute a compelling state interest. Accordingly, in the absence of a finding or findings of constitutional or statutory violations, any interest which government might have in utilizing race-conscious remedies is not compelling. *Fullilove, supra*, 448 U.S. at 498 (Powell, J. concurring). As stated there, this Court has often struck down racial classifications as an impermissible means of advancing even legitimate governmental interest.

The requirement for findings serves several important purposes: to aid in determining whether or not a remedial racial preference is aimed at past discrimination; to assist in application of the narrowly tailored test (the second prong of strict scrutiny); and to protect against "the casual use of racial distinctions" and to reinforce the seriousness of their utilization. *J.A. Croson Company v. City of Richmond*, 779 F.2d 181, 202 (4th Cir. 1985) (dissenting opinion), *vacated*, 478 U.S. 1016 (1986). *Amicus* submits that these factors are also applicable to actions by Congress, as well as state and local governments, notwithstanding the greater latitude which Congress has in its fact finding capabilities. See *Croson, supra*, 109 S.Ct. at 718-20. Where congressional action is devoid of meaningful findings, it should be found insufficient under the first prong of the strict scrutiny test.

The dangers posed by casual enactment of race conscious remedies by state and local governments are equally present at the national level, particularly where Congress can act through amendments to appropriations bills with little accompanying legislative deliberation. This process is also in marked contrast to the perception of the principal opinion in *Fullilove* that the measure approved there was one which would receive careful reexamination before reenactment, and one which would call for continuing congressional oversight to ensure its constitutionality. "For its part, Congress must proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment. . . ." 448 U.S. at 490.

Finally, as noted by Justice Stevens in his dissenting opinion in *Fullilove*, 448 U.S. 532, 542, 548-53, and as argued by former Assistant Attorney General Drew Days, there are numerous reasons not to defer to Congress in this context. "Even proponents (of racial preferences programs) should demand that these efforts by the federal government to assist minority contractors be the result of an open, thorough, and considered process." Days, *Fullilove*, 96 *Yale Law Journal* 453, 469 (1987).

"When Congress has taken the extraordinary step of adopting an explicit

racial classification . . . the Court has the responsibility to assure itself that the decision was reasoned and deliberate." *Id.* at 469-70. *Sub judice*, this Court should require that Congress "demonstrate that it has relied on a complete record and has acted with a full understanding of the program's implications." *Id.* at 470. Congress has not done this, and the lower court's conclusions on this point should be upheld.

### III.

**It Is Undisputed That The FCC's Minority Preference Policies Do Not Prevent Participation By Minority Group Members Who Are Not Suffering From The Present Effects Of Past Racial Discrimination. The Lack Of Any Safeguards Against Unjust Enrichment Renders The Program Defective Under The Narrowly Tailored Test, And Also Undercuts The Moral And Ethical Basis For Utilization Of Racial Preferences.**

The FCC's distress sale policy cannot pass constitutional muster because of its "over-inclusiveness," or lack of safeguard against participation by individuals who are not disadvantaged or otherwise victims of racial discrimination. This factor, among others, convinced the lower court that the program was not narrowly tailored. 876 F.2d at 915-17.

Petitioner urges that such considerations are irrelevant in that the program is not being defended as remedial in nature. Petitioner's brief, p.43. This brief will not deal with the question of whether diversity can constitute a sufficiently compelling State interest to justify the use of racial criteria. Based upon this Court's decisions, *amicus* contends that any use of racial preferences other than to remedy past discrimination cannot be justified.

The discussion that follows therefore assumes the relevance of considerations of the economic status of the beneficiaries, as did the lower court, 876 F.2d at 915-17, and as did this Court in *Fullilove, supra*, 448 U.S. at 471-72 (adequate safeguards against unjust participation) and 448 U.S. at 486-88 (degree of preference relates to effects of past disadvantage or discrimination). See also *Croson*, 109 S.Ct. at 727-730.

#### A.

##### ***The Failure of This Racial Preference Program to Benefit the Disadvantaged.***

A recurring criticism of many types of racial preferences, particularly in the context of those preferences which provide a competitive advantage to existing minority businesses, is that the benefits of such programs flow mainly to those who need them the least. This concern is expressed by

scholars on both sides of the argument for and against continued use of racial preferences as a form of affirmative action. Compare the views of William Julius Wilson ("Ghetto underclass individuals are severely under-represented among those who have actually benefitted from such programs,")<sup>1</sup> with those of Thomas Sowell ("In some cases - including the United States - the less fortunate members of a preferred group may actually retrogress while the more fortunate advance under preferential policies.")<sup>2</sup>

Whatever the outcome of the intense and sometimes acrimonious debate over racial preference policies, there can be no doubt that the likely beneficiaries of the FCC's distress sale policy will come from the ranks of those less likely to be suffering from the lingering effects of past racial discrimination. With respect to judicial review of the constitutionality of racial preference programs, the questions of unjust enrichment and protections against it are of key importance. See, *Fullilove, supra*, 448 U.S. at 471-72.

While these concerns usually arise in terms of whether a program survives the narrowly tailored test, it is evident that this issue also goes to the question of whether there is a

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1 William Julius Wilson, *The Truly Disadvantaged* (Chicago: University of Chicago Press 1987), p. 110.

2 Thomas Sowell, "Affirmative Action: A Worldwide Disaster," *Commentary*, December 1989, p. 33.

compelling governmental interest in the use of racial criteria. The moral and ethical underpinnings of such programs are also implicated.

First, in the absence of findings, it is not possible to determine whether a program is in fact narrowly tailored, or whether it may in fact be vulnerable to a charge of political favoritism. *Croson, supra*, 109 S.Ct. at 728. Second, as in *Fullilove*, and as seen in other federal programs, Congress has frequently expressed its intent that such programs should benefit only those who are *actual* victims of racial discrimination. See *Fullilove, supra*, 100 S.Ct. at 2767-68, discussing the Small Business Administration's programs.

Finally, with respect to maintaining public confidence in the integrity of any governmental activity, particularly one utilizing suspect classifications such as race, the perception that such programs are likely to provide benefits for those not actually disadvantaged is likely to lead to negative consequences for all affirmative action programs.

## B.

### ***The Appropriateness Of Individualized Inquiries Into The Existence Of Disadvantage.***

The defects in the FCC's program are more aggravated when one considers the possibility of individualized determinations of disadvantage in competition for unique opportunities such as a broadcast license. In *Croson*, this

Court strongly indicated that individualized consideration of whether or not a potential participant in a preference program is a victim of racial discrimination should be a part of the process. 109 S.Ct. at 728-29. Administrative convenience is not a sufficient justification to avoid the necessity of this determination. *Id.* at 729.

It is undisputed that the policies at issue in this case do not provide for determination of whether an individual beneficiary or beneficiaries are victims of race discrimination, or are disadvantaged in any way. Considering the uniqueness of the opportunity presented and the relatively small number of individuals involved in the procedures at issue in this case, it would seem that the case-by-case nature of the decision-making process would provide ample room for such individual determinations.

As stated by the dissenting opinion in *Winter Park Communications v. FCC*, 873 F.2d 347, 368 (D.C. Cir. 1989), there is "no obvious need to employ a mechanical racial preference and forego inquiry into the beneficiaries' actual circumstances. No FCC preference for successful Hispanic entrepreneurs can remedy the years spent by other Hispanics picking lettuce as a result of racial discrimination." 873 F.2d at 368.

## CONCLUSION

Amicus respectfully requests that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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In The  
Supreme Court of the United States

October Term 1989

ASTROLINE COMMUNICATIONS COMPANY,  
Limited Partnership,

*Petitioner,*

v.

SHURBERG BROADCASTING OF  
HARTFORD, INC., et al.,

*Respondents.*

On Petition for Writ of Certiorari to  
the United States Court of Appeals  
for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL  
FOUNDATION IN SUPPORT OF RESPONDENTS

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No. 89-700

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for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL  
FOUNDATION IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF AMICUS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of respondent, Shurberg Broadcasting of Hartford, Inc. (Shurberg). Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus is submitting this brief because it believes its public policy perspective and litigation experience opposing race-based decisions by government entities will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Fifth and Fourteenth Amendments to the United States Constitution. Amicus believes the lower court's opinion correctly declared the "minority distress sale" policy of the Federal Communications Commission (FCC) to be unconstitutional reverse discrimination because it is not narrowly tailored to remedy past discrimination or to promote program diversity.

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#### OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 876 F.2d 902 (D.C. Cir. 1989).

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#### STATEMENT OF THE CASE

This case presents the issue of whether the equal protection component of the Fifth Amendment to the United States Constitution tolerates race preferences in the "minority distress sale" policy of FCC.

The issue arose when FCC designated Faith Center's renewal application for noncomparative hearing. This activated Faith Center's interest in making a distress sale,<sup>1</sup> but it failed in two attempts. Shurberg then filed a petition with FCC requesting that its permit application be designated for a comparative hearing with Faith Center's renewal application. Before FCC had a chance to act on Shurberg's petition, Faith Center again petitioned FCC to approve a distress sale to Astroline. Shurberg objected to the Faith Center/Astroline distress sale application.

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<sup>1</sup> In 1978 FCC adopted a distress sale program. It permits licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, to transfer or assign their licenses at a discounted "distress sale" price to applicants with significant minority ownership interest. Minority includes American Indians, Alaskan Natives, Asians, Pacific Islanders, Blacks, and Hispanics. 47 U.S.C. § 309(i)(3)(C). Originally, purchasers could qualify for the distress sale program if a minority owned more than 50%, or controlling, interest in the purchasing entity. In 1982, FCC extended eligibility for the program to limited partnerships in which the general partner was a member of a minority group, and owned at least 20% of the broadcasting entity. The sale price could not be more than 75% of the fair market value. See *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

FCC rejected Shurberg's argument that the distress sale policy violated nonminorities' constitutional right to equal protection as "without merit." FCC based its conclusions on "its findings of 'underrepresentation' of minorities in the broadcast industry and its view that increased minority ownership would increase programming diversity." 876 F.2d at 906. FCC also stated that the 1982 amendments to the Communications Act in which Congress had approved the use of a lottery system that incorporated significant preferences for minority applicants supported its distress sale policy.

Shurberg filed a petition for review. Before the Court of Appeals had an opportunity to render its decision, FCC advised the full District of Columbia Circuit, sitting *en banc*, in *Steele v. Federal Communications Commission*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated* (Oct. 31, 1985), that it wished to review its minority and female preference policies. The court remanded *Steele*. The record in this case was remanded for the same purpose.

While FCC was investigating its policies, Congress enacted the 1988 Appropriations Act which contained the funding for FCC for fiscal year 1988. It forbade FCC to repeal or alter the distress sale program. Joint Resolution, Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987). Congress extended this policy through fiscal year 1989.

FCC abandoned its investigation and a divided Court of Appeal correctly found FCC's minority distress sale policy to be unconstitutional.

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## SUMMARY OF ARGUMENT

FCC's minority distress sale policy classifies on the basis of race and is therefore constitutionally suspect. A racial classification whether adopted by the federal government, state, or local government, should be subject to the same exacting standard: the strict scrutiny test. A strict scrutiny standard requires that the racial classification be "narrowly tailored" to achieve a "compelling governmental interest." It provides enhanced protection against the unfocused use of blunt, race-based devices.

Remedying the effects of identified present or past racial discrimination is the only sufficiently compelling justification for a racial classification. That justification is clearly lacking here. The evidence reviewed by Congress is insufficient to justify a race-conscious relief.

Because there is no finding of prior discrimination in the broadcast industry, the race-based preference policy must be justified by some other compelling governmental interest. FCC asserts that the distress sale policy promotes diversity of programming. But this Court has never held that program diversity is a sufficiently compelling justification for the government to use a race-based remedy. The notion that race is a valid factor for programming choices is precisely the type of racial stereotyping that is anathema to basic constitutional principles.

Moreover, even if this Court could find FCC's minority distress sale policy goal important enough to warrant use of a race classification, it is not narrowly tailored. The minority preference applied by FCC in its distress sale policy is clearly inconsistent with a society dedicated to equal opportunities.

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## ARGUMENT

### I

#### ALL RACE CLASSIFICATIONS SHOULD BE SUBJECT TO THE SAME EXACTING STRICT SCRUTINY STANDARD

This case involves the issue of whether the minority distress sale policy of FCC violates the implied equal protection guarantee of the Fifth Amendment. As discussed below, this policy classifies on the basis of race and is therefore constitutionally suspect. It is amicus' position that all race classifications whether adopted by the federal government, a state, or local government should be subject to the same exacting standards of the strict scrutiny test.

##### A. Strict Scrutiny Standard Should Be Used When Examining All Race-Conscious Programs

The strict scrutiny standard has been traditionally used when examining "suspect" classifications based on race or national origin. The purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the governmental body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *City of Richmond v. J. A. Croson Company*, 488 U.S. \_\_\_, 102 L. Ed. 2d 854, 881-82 (1989) (plurality opinion of O'Connor, J.).

As Justice O'Connor explained:

"Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." 102 L. Ed. 2d at 881-82; see also *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (plurality opinion).

The strict scrutiny analysis requires the satisfaction of two prongs. The first prong focuses on the asserted compelling governmental interest supporting the racial classification. This requires the court to identify the interest and then determine whether there are sufficient facts or evidence to support that interest. The second prong focuses on whether a racial classification is narrowly tailored to promote the compelling governmental interest. This requires a determination that alternative race-neutral remedies were considered before resorting to a race-conscious measure and that the racial preference is limited to those who in fact have suffered past discrimination. *Wygant*, 476 U.S. at 267, 274, 285; *Croson*, 102 L. Ed. 2d at 881-82 (plurality opinion). See also *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 463-67 (1980) (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring).

In *Korematsu v. United States*, 323 U.S. 214, 216 (1944), this Court first articulated that all racial classifications are suspect and must be subject "to the most rigid scrutiny." 323 U.S. at 216. This Court has not swayed from this standard of review when confronted with a classification

based on race. In *Wygant* this Court stated: "Racial, and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." 476 U.S. at 273 (quoting *Bakke*, 438 U.S. at 291 (opinion of Powell, J., joined by White, J.)). Just last term in *Croson*, a majority of this Court held that state and local government race-based programs are suspect classifications subject to strict scrutiny by the courts. 102 L. Ed. 2d at 882 (plurality opinion of Justice O'Connor, joined by Justices White, Kennedy, and the Chief Justice, and opinion of Scalia, J., concurring at 899).

The distress sale program at issue here allows a licensee whose license is in jeopardy due to a renewal or revocation proceeding to sell the station at up to 75% of market value to a minority owned or minority controlled purchaser. The distress sale program is plainly limited to American Indians, Alaskan Natives, Asians, Pacific Islanders, Blacks, and Hispanics. 47 U.S.C. § 309(i)(3)(C). Because this policy classifies on the basis of race it is constitutionally suspect.

#### **B. Race Classifications by the Federal Government Should Be Examined Under the Strict Scrutiny Standard**

Although the Equal Protection Clause of the Fourteenth Amendment applies only to the states, the equal protection analysis under the Fifth Amendment is generally the same. Amicus believes that the same analysis should apply to all race-conscious programs regardless of whether a constitutional challenge is brought under the

Fifth Amendment due process guarantee or the Fourteenth Amendment equal protection guarantee.

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), this Court invalidated segregation of public schools in the District of Columbia finding that racial segregation violates the Due Process Clause. In doing so, the opinion explained the relationship of the Fifth and Fourteenth Amendments:

"The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." 347 U.S. at 499.

In *Weinberger v. Wissenfeld*, 420 U.S. 636 (1975), this Court reaffirmed: "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to the equal protection claims under the Fourteenth Amendment." *Id.* at 638 n.2. This Court in *United States v. Paradise*, 480 U.S. 149 (1987), stated: "Because the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth, we need not decide whether the race-conscious relief ordered in this case would violate the former as well as the latter constitutional provision." 480 U.S. at 166 n.16.

The guaranty of equal protection prohibits the government from discriminating between individuals or groups on an illicit basis. When an individual is being penalized because of his or her race, it matters little whether the racial classification is promoted by the federal government, a state, or a local government. A strict scrutiny standard of review for all racial classifications would be in complete harmony with the goal of a color-blind society free from racial bias.

## II

### THE DISTRESS SALE POLICY DOES NOT REMEDY THE EFFECTS OF IDENTIFIED PRESENT OR PAST RACIAL DISCRIMINATION

Remedying the effects of identified past or present racial discrimination is the only interest this Court has identified as being sufficiently compelling to justify a race-based plan. This requires a race-conscious plan to contain factual predicates that identify past or present discrimination sufficient to establish a compelling governmental interest. *Croson*, 102 L. Ed. 2d at 889.

The distress sale policy at issue here is designed to promote minority ownership of broadcast facilities. It does not suffice to justify a race-based preference policy.

FCC has cited congressional statements that minority underrepresentation was the result of past discrimination. 876 F.2d at 913-14. These statements include a 1982 amendment to the Communications Act which authorizes FCC to award licenses under a random selection system

and to utilize a lottery in place of the comparative hearing process. By its own terms, this provision does not address the distress sale policy. 47 U.S.C. § 309(i)(3)(A).

Additionally, the conference committee report accompanying this act suggested that minority underrepresentation in broadcasting is merely part of the larger phenomenon of minority underrepresentation. It acknowledged that Congress was aware that minorities "traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982). This committee report hardly expresses congressional endorsement for a racial classification.

The only other congressional action which allegedly shows congressional approval is a 1987 appropriation rider which contained funding for fiscal year 1988. It contained language directing FCC to reinstate prior policy with respect to granting minority preferences. Pub. L. No. 100-202, 101 Stat. 1329. It is not based on any specific record regarding FCC's distress sale policy. By its terms, it does not charge FCC with any remedial duties or make findings of past discrimination affecting the broadcast industry.

The sparse legislative history relied upon by FCC cannot be regarded as sufficient evidence of congressional findings of past or present discrimination to justify a race-conscious relief. Moreover, these actions taken by Congress were passed years after the distress sale policy was in place.

Moreover, any reliance on *Fullilove v. Klutznick*, 448 U.S. 448, is misplaced. In *Fullilove*, a fragmented

Court examined racial classifications imposed by Congress. This Court discussed the equal protection standard of review applicable to congressional race-based remedial measures enforced against the states and the degree to which Congress may exercise its unique remedial powers under Section 5 of the Fourteenth Amendment. 448 U.S. at 472-92 (Burger, C.J., writing for the plurality).

Unlike *Fullilove*, FCC's preference classification is a federal agency's response to judicial directions<sup>2</sup> and is not attributable to any congressional action taken pursuant to Section 5 of the Fourteenth Amendment. Section 5 is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantee of the Fourteenth Amendment." *Croson*, 102 L. Ed. 2d at 879 (emphasis added) (quoting *Katzenbach v. Morgan*, 348 U.S. 641, 651 (1966)). Since the reasons identified in *Croson* and *Fullilove* for giving greater deference to a congressional determination of a compelling need for a racial classification apply uniquely to Congress, there is no basis for giving similar deference to a federal governmental agency.

<sup>2</sup> In 1973, the Court of Appeals encouraged FCC to give preferential treatment to minority applicants. *TV 9, Inc. v. Federal Communications Commission*, 495 F.2d 929 (D.C. Cir. 1973). *Accord Garrett v. Federal Communications Commission*, 513 F.2d 1056 (D.C. Cir. 1975). Accordingly, FCC adopted several programs to increase minority ownership and participation in the broadcast industry. It implemented the minority preferences in the comparative hearing process, making the distress sales policy available only to minority purchasers, and a policy of affording tax certificates to sellers of media properties where the purchaser is minority-owned or minority controlled. 92 F.C.C.2d 840-50.

Further, *Fullilove* indicates that Congress will not resort to a race-based remedial measure in a vacuum. The plurality opinion noted that the minority preference program was within Congress' power only after the justices had looked to a variety of congressional reports, hearings, and legislation relating to the problems of minority business enterprises. 448 U.S. at 477-78. Justice Powell similarly concluded that Congress must have "made findings adequate to support its determination that minority contractors have suffered extensive discrimination." *Id.* at 502.

Here, Congress is not redressing any perceived discrimination by the states or local government. Additionally, Congress did not possess any evidence remotely identifying any discrimination by FCC or in the broadcast industry generally. Unlike *Fullilove*, the legislative record here articulates no basis for a finding that Congress had sufficient evidence before it to justify race-conscious relief. "None of these 'findings,' singly or together, provide the [FCC] with a 'strong basis in evidence for its conclusion that remedial action was necessary.' There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in [the broadcast industry.]" *Croson*, 102 L. Ed. 2d at 886. Absent a finding of past discrimination, the first prong of the constitutional test is not satisfied.

### III

#### PROGRAM DIVERSITY IS NOT A SUFFICIENTLY COMPELLING JUSTIFICATION FOR USE OF A RACIAL CLASSIFICATION

FCC also seeks to rationalize its minority distress sale policy with the goal of promoting program diversity.

876 F.2d at 913. It contends that program diversity is a goal that in and of itself is sufficient to justify racial preferences. Statement in Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 981 (1978).

Program diversity is insufficient to create a compelling governmental interest justifying a race-based policy. "Programing diversity" and the related notions of "minority" or "nonminority" programming are "elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 796-97 (1978).

Freedom of speech is prized because it informs the electorate within a democracy and helps to produce useful ideas. Diversity of programming skews the distribution of First Amendment values to one group and there is no purpose to justify the policy. This is a form of content control, forbidden by the First Amendment.

Reluctantly, the court below accepted the holding in *West Michigan Broadcasting Co. v. Federal Communications Commission*, 735 F.2d 601 (D.C. Cir. 1984), that the promotion of programming diversity is a sufficiently compelling governmental purpose to support a race-conscious policy. 876 F.2d at 920. *West Michigan* relied on Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. at 313, that FCC's program diversity goal is analogous to academic diversity. Yet the diversity interest discussed by Justice Powell in *Bakke* is much different from the program diversity advanced by FCC.

In *Bakke*, this Court struck down a university admission policy that set fixed goals for minority admission. Only Justice Powell reached the constitutional issue. Justice Powell found that the use of race as a factor in the educational admissions process for the purpose of obtaining diverse student bodies was tied to the notion of academic freedom. *Bakke*, 438 U.S. at 313. A university's First Amendment freedom to select and create its own diverse student body was deemed important for exposing students to the "atmosphere of 'speculation, experiment and creation.'" This was determined to be "essential to the quality of higher education." *Id.* at 323.

This unique academic goal does not have a counterpart in FCC's race-based preference policy. FCC's use of minority preference to further its goal of attaining diverse broadcast programming, on the First Amendment value, is based on the rationale "that the widest possible dissemination of information for diverse and antagonistic sources is essential to the welfare of the public." *West Michigan*, 735 F.2d at 614 (quoting the 1965 Policy Statement, 1 F.C.C.2d at 394 n.4).

The plain meaning of the First Amendment requires the federal government to stay neutral, not to promote either diversity or conformity in the areas of programming. Furthermore, while "the widest possible dissemination of information from diverse and antagonistic sources" may be a worthy goal (*Associated Press v. United States*, 326 U.S. 1, 20 (1945)), that goal is achieved through a free marketplace of ideas and not through government fiat. *Office of Communication of the United Church of Christ v. Federal Communications Commission*, 707 F.2d 1413 (D.C. Cir. 1983). And, the marketplace is working.

The underlying rationale for regulating the broadcast industry was the concept of scarcity because everyone cannot broadcast at the same time, same place, and on the same frequency. This rationale was frequently under attack because of the increased number of frequencies, the advent of cable, and satellite television. See *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984).

The scarcity doctrine has now become obsolete. In *Syracuse Peace Council v. Federal Communications Commission*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 58 U.S.L.W. 3427 (Jan. 9, 1990), the Court of Appeal affirmed FCC's determination to abandon the "fairness doctrine" because there is no longer an inadequate diversity of viewpoint in television programming. Because of the number of competing outlets available today, the market itself will generate diversity of programming. Thus, program diversity can never qualify as a compelling governmental interest because that diversity already exists.

Moreover, FCC has failed to present sufficiently compelling evidence establishing a nexus between an owner's race and program diversity. It seems that program diversity rationale requires official identification and labeling of "Black," "Hispanic," and "Aleutian" programming and viewpoints. It assumes that we can tell how a person is going to think, speak, and act solely on the basis of skin color rather than as individuals. The Court of Appeal for the District of Columbia Circuit expresses it well: "[I]t is contrary to one of our most cherished constitutional and societal principles. That principle holds that an individual's taste, beliefs, and abilities should be assessed on their own merits rather than categorizing that individual as a

member of a racial group presumed to think and behave in a particular way." *Steele v. Federal Communications Commission*, 770 F.2d at 1198. This type of racial stereotyping is an anathema to fundamental constitutional principles.

In *Wygant*, this Court stated:

"This Court has 'consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." ' " *Wygant*, 476 U.S. at 273 (quoting *Loving v. Virginia*, 338 U.S. 1, 11 (1967)).

As Justice Powell observed in *Wygant*:

"Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive." 476 U.S. at 276 (plurality opinion) (emphasis in original). Accord *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

FCC's program diversity policy appears to be the type of racial stereotyping that the *Croson* majority identified as a preeminent danger in the use of racial classifications. See *Croson*, 102 L. Ed. 2d at 896 (Stevens, J., concurring and 102 L. Ed. 2d at 903 Scalia, J., concurring). Societal discrimination is indifferent to whether there was or is any discrimination in a particular program. Allowing this type of race-based program to stand would authorize government to introduce race into any program even where there have been no race-based barriers to minorities.

In sum, FCC has been unable to determine any factual support for its program diversity goal.

#### IV

#### THE RACE-BASED DISTRESS SALE POLICY IS NOT NARROWLY TAILORED

Even if it could be said that there is a compelling governmental interest to justify FCC's minority distress sale policy, the policy is plainly not narrowly tailored to achieve the remedial purpose. *Croson*, 102 L. Ed. 2d at 890; *Wygant*, 476 U.S. at 274; *Fullilove*, 448 U.S. at 480.

##### A. The Distress Sale Policy Is Not Narrowly Tailored to Remedy the Effects of Past Discrimination

The minority preference policy is not aimed at correcting the actual effects of past discrimination. See, e.g., *Croson*, 102 L. Ed. 2d at 896 (Stevens, J., concurring in part and concurring in the judgment); *Fullilove*, 448 U.S. at 480-82. The minority distress sale policy does not allow for a case-by-case inquiry into whether or not the minority purchaser seeking to use the distress sale policy has suffered from the effects of past discrimination. The opportunity to use the distress sale policy is granted to any minority purchaser whether or not it has been disadvantaged by past discrimination. As this Court found in *Croson*, it is almost impossible to determine whether a program is narrowly tailored when it is not linked to identified discrimination in any way. 102 L. Ed. 2d at 890.

Also, there has been no prior consideration of the use of race-neutral means to increase minority participation. See *Croson*, 102 L. Ed. at 890; *Fullilove*, 448 U.S. at 463-67; *id.* at 511 (Powell, J., concurring). In *Wygant*, the plurality opinion noted that the term "narrowly tailored" requires consideration of whether lawful alternatives and less restrictive means could have been used. *Wygant*, 476 U.S. at 282-84. In *Croson*, the Court noted that many of the barriers to minority business enterprises participation seemed to appear race neutral. "If MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation." *Id.* at 890-91.

Here, the only identifiable barrier is that minorities have less capital than nonminorities. Lack of money can hardly be viewed as a barrier amounting to discrimination. It is simply one of the many nonracial factors that seem to face any group seeking to establish a new business enterprise. See *Croson*, 102 L. Ed. 2d at 890-91. This type of nonracial barrier should be addressed through race-neutral means. *Id.* Yet, FCC failed to consider race-neutral means. Instead, the minority distress sale policy is a drastic race-specific preference and is not constitutionally permissible under *Croson*.

The burden of minority preference also imposes an unfair burden on innocent third parties. See *Wygant*, 476 U.S. at 282-84; *Fullilove*, 448 U.S. at 484. Unlike *Fullilove*, in which this Court found the "actual 'burden' shouldered by nonminority firms is relatively light" (448 U.S. at 484), the distress sale policy deprives a non-minority of a unique opportunity to own a broadcast

station, solely because of his race. Nonminorities need not apply.

**B. The Distress Sale Policy  
Is Not Narrowly Tailored to  
Promote Program Diversity**

FCC's minority distress sale policy to promote program diversity is not narrowly tailored. First, FCC has declared that program diversity already exists and is assured by the marketplace. Thus, program diversity by itself cannot justify content control. If the purpose is to give viewers diversity of viewpoint, viewpoint cannot be regulated. If it is intended only to make sure that there is an equal balance in the number of broadcast stations owned by minorities to the number of minorities in the national population, then it is discrimination.

Second, there is no record to demonstrate that the use of a race-based preference scheme to increase minority ownership is essential to achieving program diversity. See *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C.Rec 1315 (1986), modified, 2 F.C.C.Rec 2377 (1987).

Third, by not considering race-neutral alternatives, FCC has increased the risk of racial stereotyping. Under FCC's program diversity rationale, it is assumed that race will determine what type of programming minority station owners will provide as well as the type of programming viewers and listeners will want. This is "the type of stereotypical analysis that is a hallmark of violations of

the Equal Protection Clause." *Croson*, 102 L. Ed. 2d at 896 (Stevens, J., concurring).

Fourth, to the extent FCC's policies are designed to correct the "underrepresentation" of certain viewpoints by awarding preferences to specific groups until true diversity is achieved, there are no set limits so that a reviewing court knows when the goal has been attained. Minority preferences could conceivably end only when the percentage of minority-owned stations is in balance with nationwide minority representation. See *Winter Park Communications, Inc. v. Federal Communications Commission*, 873 F.2d 347, 360 (D.C. Cir. 1989). FCC's minority distress sale policy is potentially "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276 (plurality opinion).

Because the distress sale policy is deficient in each and every respect, it simply cannot be said to be narrowly tailored and is therefore invalid.

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